Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. , Misc. 76-939

AMERICAN TELEPHONE AND TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INC.; and
BELL TELEPHONE LABORATORIES, INC., *Petitioners*,
v.
UNITED STATES OF AMERICA, *Respondent*.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA OR IN THE ALTERNATIVE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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January 6, 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

October Term, 1976

No. ———, Misc.

American Telephone and Telegraph Company; Western Electric Company, Inc.; and Bell Telephone Laboratories, Inc., *Petitioners,*

v.

United States of America, *Respondent.*

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI

Now come petitioners and respectfully move this Court for leave to file, under 28 U.S.C. § 1651(a), the annexed petition for writ of certiorari to the United States District Court for the District of Columbia to review two orders entered by that court on November 24, 1976, and December 22, 1976, respectively, copies of which are annexed to the petition as Appendices A and B, and for such other and further relief as may be just and proper.

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No. ———, Misc.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; and BELL TELEPHONE LABORATORIES, INC., *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari be issued to review two orders entered by the United States District Court for the District of Columbia on November 24, 1976, and December 22, 1976, respectively. The first order disposed of certain issues raised by that court, on its own motion, with respect to its jurisdiction over a civil antitrust proceeding in which the United States has charged petitioners with monopolizing (and conspiring and attempting to monopolize) interstate trade and commerce in telecommunications service and equipment in violation of Section 2 of the Sherman

Act. 26 Stat. 209, as amended, 15 U.S.C. § 2. The second order denied, for the reasons set forth in the first order, a motion filed by petitioners to dismiss the complaint on the ground that, by virtue of the provisions of the Communications Act of 1934 (48 Stat. 1086, as amended, 47 U.S.C. §§ 151 *et seq.*) and comparable state regulation referred to therein and thereby made an integral part of federal policy, the matters involved are within the exclusive jurisdiction of regulatory agencies and, hence, beyond the jurisdiction of an antitrust court.

OPINION BELOW

The orders of the district court have not yet been reported. The Memorandum Opinion and Order on Jurisdictional Issues, dated November 24, 1976, is annexed hereto as Appendix A. The order of December 22, 1976, denying petitioners' motion to dismiss, is annexed as Appendix B.

JURISDICTION TO REVIEW

The dates of the district court's orders are November 24, 1976, and December 22, 1976, respectively. On January 6, 1977, petitioners filed a petition for writ of certiorari to review these orders under 28 U.S.C. § 1651 (a) in the United States Court of Appeals for the District of Columbia Circuit. The jurisdiction of this Court is invoked alternatively, under 28 U.S.C. § 1651(a) and under 28 U.S.C. § 1254(1).

28 U.S.C. § 1651(a) empowers this Court to issue a writ of certiorari to the district court in aid of the Court's ultimate appellate jurisdiction. This Court has appellate jurisdiction over the action under Section 2 of the Expediting Act of February 11, 1903 (32 Stat. 823, as amended, 15 U.S.C. § 29) and 28 U.S.C. § 1254

(1). The jurisdiction of this Court to review the district court's orders by common law writ of certiorari is established by the following decisions of this Court:

United States Alkali Export Association, Inc. v. *United States,* 325 U.S. 196 (1945);
Far East Conference v. *United States,* 342 U.S. 570 (1952);
De Beers Consolidated Mines, Ltd. v. *United States,* 325 U.S. 212 (1945);
United States v. *National City Lines, Inc.,* 337 U.S. 78 (1949);
Ex Parte Peru, 318 U.S. 578 (1943);
Ex Parte United States, 287 U.S. 241 (1932).

28 U.S.C. § 1254(1) empowers the Court to review by writ of certiorari cases pending in the courts of appeals, including cases filed under 28 U.S.C. § 1651(a). *Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964). The jurisdiction of this Court to review the district court's orders by writ of certiorari before judgment in the court of appeals is established by the following decisions of this Court:

United States v. *Nixon,* 418 U.S. 683 (1974);
New Haven Inclusion Cases, 399 U.S. 392 (1970);
United States v. *United Mine Workers,* 330 U.S. 258 (1947);
Railroad Retirement Board v. *Alton R.R. Co.,* 295 U.S. 330 (1935).

The extraordinary circumstances which warrant exercise by this Court of its discretionary power to issue a common law writ of certiorari to the district court or, in the alternative, to issue a writ of certiorari before judgment to the court of appeals, as requested by this petition, are set forth under the heading "Reasons for Granting the Writ."

QUESTION PRESENTED

Whether the district court may assert jurisdiction over an antitrust complaint charging monopolization of and conspiracy and attempt to monopolize alleged markets for telecommunications services and equipment in which petitioners and all other Bell System companies referred to in the complaint participate solely as a pervasively regulated common carrier enterprise under Title II of the Communications Act of 1934 and comparable state regulatory statutes, where virtually all of the conduct relied upon in support of that complaint is inextricably intertwined with the discharge by the Bell System of its common carrier responsibilities and where any remaining conduct involved is reasonably ancillary thereto and subject to regulation by the Federal Communications Commission and state regulatory agencies?

STATUTORY PROVISIONS INVOLVED

The pertinent portions of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. § 1 *et seq.*), the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. § 151 *et seq.*), the All Writs Act (62 Stat. 944, as amended, 28 U.S.C. § 1651) and the Expediting Act (32 Stat. 823, as amended, 15 U.S.C. § 28 *et seq.*) are set forth in Appendix C to this petition. The principal regulatory statutes of the States in which the Bell System provides common carrier telecommunications services are also involved. Citations to these statutes are set out in Appendix C.

STATEMENT

This is an extraordinary case with almost an Alice-in-Wonderland flavor. For most of the period since the invention of the telephone more than 100 years ago, the Bell System has provided the bulk of this Nation's

common carrier telecommunications services, including the equipment used in providing such services, pursuant to legal franchises and regulatory authorization. Yet the only offense against the antitrust laws stated in the complaint is that the Bell System has monopolized the business of providing telecommunications service and equipment.

The business of providing common carrier telecommunications service is the most pervasively regulated business in the country—one in which the ultimate power with respect to virtually every activity reposes as a matter of law with regulatory agencies, not with the common carrier enterprises that provide service. Yet the district court has asserted judicial power over these same activities under the antitrust laws, even though those laws concededly embody a standard different from and inconsistent with the public interest standard mandated by the Communications Act and comparable state statutes.

The parties are therefore on the brink of commencing full-scale discovery in preparation for an ultimate trial with respect to charges that range over the entire gamut of the Bell System's common carrier activities during the past decade and over the whole history of the development of its present structure—a process that would almost certainly last ten years and impose staggering burdens upon the courts, upon the parties, and upon countless non-parties who have had some connection with the provision of common carrier telecommunications service in this country. Yet it is apparent from the proceedings before the district court that virtually every one of these charges has already been presented to regulatory agencies and that any remaining charges could have been presented in the course of the numerous proceedings that have been,

and are being, conducted by regulatory agencies with respect to the very matters involved in this case.

In these circumstances, petitioners feel compelled to seek review of the district court's jurisdictional orders and, in view of the unusual nature of this case and the burdens of discovery and trial, to request that this Court issue a definitive ruling on the threshold question of jurisdiction as soon as possible. To facilitate this procedure, petitioners are simultaneously filing a motion to accelerate consideration of this petition. Petitioners are prepared to stand on the petition as their brief on the merits and to meet any schedule the Court may set with respect to further briefing and argument in the case.

The question sought to be presented to the Court by this petition is quite simple. However, in order to provide the Court with the background facts necessary fully to appreciate the significance of this question, a statement of the facts of the case and the reasons for granting this petition for certiorari somewhat fuller than typical of such petitions seems appropriate. Indeed, in view of petitioners' expressed willingness to stand on this petition as their brief on the merits, this approach would appear to be virtually a necessity.

The Regulatory Background

The business of providing common carrier telecommunications service in this country has for many decades been conducted as a legal monopoly—first, under the patents issued to the inventors of the telephone and, later, pursuant to a series of state and federal statutes which required a coordination among companies providing such services to establish a single unified nationwide telecommunications network. These statutes have sought to accomplish this goal by subjecting telecommunications companies to pervasive common carrier regulation on both the federal and state level, the ex-

pressly stated goal of such regulation being to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges" (47 U.S.C. § 151). The result of this statutory scheme has been the development of a nationwide telecommunications network consisting of the Bell System companies and some 1600 independent telephone companies, which, operating as a partnership rather than as competitors, provide end-to-end telecommunications service—that is, both switched message service (ordinary local and long distance calls) and private line service—between all points in the continental United States. This network has been designed, operated and managed under a uniform set of technical standards established to provide telecommunications service in the least costly, most reliable and most efficient manner possible.

In the 1960's, the Federal Communications Commission began to embark upon a policy of encouraging wider participation in the provision of telecommunications service. The Commission's first major decision in this direction was *In re Carterfone,* 13 F.C.C.2d 420 (1968).[1] In *Carterfone,* the Commission invalidated tariffs of the telephone companies which had been in effect virtually since the inception of telephony and which prohibited the attachment to the telecommunications network of equipment that was not provided by the carriers responsible for the operation of that network. The FCC did not, in its *Carterfone* deci-

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[1] Prior to *Carterfone,* the FCC had issued a few decisions of relatively lesser importance involving the possibility of substitutions for, or wider participation in the provision of, common carrier telecommunications services. These decisions included *Allocation of Frequencies in the Bands Above 890 Mc.,* 27 F.C.C. 359 (1959), 29

sion, relieve the existing common carriers of their obligation to provide all of the facilities and equipment necessary for telecommunications service to all users; instead, its new policy was intended to permit telecommunications users under certain circumstances to provide their own equipment.

Even the *Carterfone* decision, however, did not sanction a wholesale, indiscriminate connection of customer-provided equipment to the nationwide telecommunications network. Recognizing the possible harm that might result from indiscriminate interconnection, the Commission indicated its intention to develop a set of rules to define the rights of users in this respect. At the time of the *Carterfone* decision, the Commission did not believe itself to be in a position to specify these rules.[2] Consequently, in cooperation with state regula-

F.C.C. 825 (1960) (which allocated additional frequencies for use by private microwave systems); *General Mobile Radio Service*, 13 F.C.C. 1190 (1949), and *Allocation of Frequencies in the 150.8-162 Mc/s Band*, 12 F.C.C.2d 841, 14 F.C.C.2d 269 (1968), *aff'd sub nom. Radio Relay Corp.* v. *FCC*, 409 F.2d 322 (2d Cir. 1969) (which dealt with allocation of frequencies and questions of interconnections for radio common carriers primarily operating paging systems); and *Allocation of Frequencies in the Radio Spectrum from 10 Kilocycles to 30,000,000 Megacycles*, 39 F.C.C. 295 (1948), *Establishment of Physical Connections and Through Routes and Charges Applicable Thereto With Respect to Intercity Video Transmission Service*, 17 F.C.C. 152 (1952), 17 F.C.C. 503 (1953), and *Television Auxiliary Broadcast Stations*, 17 P&F Radio Reg. 1621 (1958) (which dealt with allocation of frequencies and questions of interconnections for miscellaneous common carriers—that is, carriers engaged primarily in the transmission of radio and television signals).

[2] In *Western States Tel. Co.* v. *American Tel. & Tel. Co.*, 19 F.C.C.2d 1068, 1072 (1969), the Commission pointed out that at the time of the *Carterfone* decision, it "was in no position to determine the extent to which" the interconnection of customer-provided equipment could properly be permitted "consistent with efficient and economic telephone service and otherwise in the public interest," and further that it "could not be in such a position until we had a reasonable opportunity to observe closely the effects of the substantial changes being effectuated by the telephone companies in their foreign attachment tariffs . . . ."

tory agencies, it initiated an investigation into the question of the terms and conditions for such interconnection that would best serve the public interest. Eventually, it adopted a comprehensive set of technical standards under which equipment may be registered with and approved by the FCC and prescribed a set of rules under which, after such approval is obtained, any user of telecommunications service may substitute such equipment for carrier equipment.[3]

Shortly after the *Carterfone* decision, in *Specialized Common Carriers*, 29 F.C.C.2d 870 (1971), the Commission authorized a new kind of common carrier to provide certain telecommunications services—a carrier that would not have general service responsibilities, but instead would provide a limited variety of services over a selected number of routes. Again, the Commission did not relieve the existing general service carriers of any of their common carrier obligations with respect to the services to be provided by the specialized carriers; nor did it specify whether or how the specialized carriers would relate to the general service carriers in the nationwide telecommunications network. Instead, the Commission again left these relationships to be worked out under the public interest standard in subsequent proceedings. More recently, the FCC has confirmed that the specialized carriers are restricted to the pro-

[3] *Interstate and Foreign MTS and WATS*, 35 F.C.C.2d 539 (1972), 56 F.C.C.2d 593 (1975), 58 F.C.C.2d 736 (1976), *appeal pending sub nom. North Carolina Util. Comm'n* v. *FCC*, Nos. 76-1002, -1152, -1292, -1415, -1416, -1443, -1467, -1502 (4th Cir.).

vision of private line services; but within that limitation, it has permitted specialized carriers to provide their authorized services essentially anywhere they choose [4] and to interconnect their services with those of the general service carriers at any location they desire,[5] and it has required the general service carriers to take affirmative steps to coordinate their own services with those of the specialized carriers in order that service quality can be maintained.[6] Subsequently, the

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[4] Since its *Specialized Common Carrier* decision, the FCC has not denied an application by a specialized carrier to serve any route that it wished to serve. See, *e.g.*, *American Tel. & Tel. Co.* v. *FCC*, 539 F.2d 767 (D.C. Cir. 1976), *aff'g United States Transmission Systems, Inc.*, 48 F.C.C.2d 859 (1974). Nor has the FCC ever compelled any specialized carrier to serve a route that it did not wish to serve. Moreover, the FCC has recently ruled that general service carriers must make circuits available throughout their service areas for resale by specialized carriers. *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261 (1976). Under this ruling, specialized common carriers can provide service over any route they choose without even constructing their own facilities.

[5] In *AT&T, Restrictions on Interconnection of Private Line Services*, 60 F.C.C.2d 939 (1976), for example, the FCC eliminated the principal tariff restrictions with respect to the interconnection of private line services maintained by virtually all general service carriers. These restrictions had been designed, not only to protect the integrity of the network, but also to limit the ability of specialized carriers to "cream-skim" within a single service route by providing service only along the least costly portion of the route and requiring interconnection with the general service carriers to provide service over the more burdensome remaining portions of the route. *Cf. Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Comm'n*, 341 U.S. 329, 334 (1951).

[6] In negotiations conducted under the aegis of the FCC's Common Carrier Bureau in settlement of F.C.C. Docket No. 20099, the general service carriers agreed, at the Common Carrier Bureau's urging, to engage in joint engineering and testing with specialized and domestic satellite carriers in order to assure the technical quality of services offered by these carriers. *AT&T, Offer of Facilities for Use by Other Common Carriers*, 52 F.C.C.2d 727

Commission established a standard to govern the pricing of all Bell System services that are offered in competition with those offered by the specialized common carriers [7] and it is in the process of refining an elaborate cost methodology to implement this ratemaking standard.[8]

During the period after the announcement of the FCC's *Carterfone* and *Specialized Common Carrier*

(1975), *aff'd sub nom. Carpenter* v. *FCC*, 539 F.2d 242 (D.C. Cir. 1976). A comparable program of cooperation between general service carriers and miscellaneous common carriers with respect to the provision of audio and video services was brought about by the FCC in Docket No. 20199, *Joint Petition of CPI Microwave, Inc. and Midwestern Relay Co.*, 54 F.C.C.2d 502 (1975), and a similar agreement with the radio common carriers has also been submitted to the FCC for approval.

[7] The Commission has refused to permit the Bell System to price its so-called competitive services in accordance with the marginal-cost pricing approach that is typical of genuinely competitive industries and, indeed, required by competition theory. See *e.g.*, 1 A. Kahn, The Economics of Regulation: Principles and Institutions 175-76 (1970); Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 709-12 (1975); Elzinga, *Predatory Pricing*, 13 J. Law & Econ. 223, 225 (1970); *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 723-24 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Armour & Co.* v. *United States*, 402 F.2d 712, 715-17 (7th Cir. 1968); *Telex Corp.* v. *International Bus. Mach. Corp.*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975). Instead, the Commission has stated that the Bell System must follow a fully distributed cost methodology—specifically, FDC Method No. 7 as generally described in proceedings before the Commission, *AT&T, Revisions of Tariff FCC No. 260 Private Line Services, Series 5000 (TELPAK)*, 38 P&F Radio Reg. 2d 1121 (1976).

[8] In order further to specify the pricing approach which the Bell System is to follow, the Commission has required a series of meetings with the Common Carrier Bureau in which the precise accounting techniques to be used in applying FDC Method No. 7 will be spelled out. 38 P&F Radio Reg. 2d at 1216.

decisions and while the Commission has been in the process of evolving the rules to be followed in the interconnection of customer-provided equipment and in the relationships between specialized and general service carriers, there has been a vigorous controversy in the telecommunications industry—a controversy revolving around two central issues:

(1) the effect which the widespread and diverse interconnection of both customer-owned equipment and the facilities of new carriers will have upon the quality of service, reliability and systemic integrity of the nationwide switched telecommunications network; and

(2) the economic impact which selective competition for terminal equipment and intercity services will have upon the rate structures of the telecommunications industry and the ability of the general service carriers to continue to provide good service at reasonable rates.

During this period, most of the general service carriers and many state regulatory agencies have vigorously criticized the Commission's new decisions and have strongly urged that implementation of the decisions be limited so as to assure continued protection of the nationwide network against possible harm and to permit regulatory agencies to adhere to rate-making policies based on public interest rather than on purely cost considerations.[9] Conversely, some suppliers of tele-

[9] The attitude of these state regulatory agencies toward the *Carterfone* and *Specialized Common Carrier* decisions is perhaps best typified by the testimony of Professor Cyrus J. Colter, for more than 23 years a member of the Illinois Commerce Commission, at congressional hearings involving this general subject (*Hearings on*

communications equipment and companies seeking to provide specialized common carrier services have contended for a broad implementation of the Commission's *Carterfone* and *Specialized Common Carrier* decisions and, indeed, have sought to have the Com-

S. 1167 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., pt. 5, at 3812-13 (1974)):

"At present, the state regulator is able to design rates in a way that the charge for the basic services—i.e., for the use of his telephone by the average householder—is held low, while other charges, such as for terminal facilities, extensions, PBX's, etc., are kept higher. Also, residential rates are invariably kept lower than business rates. These rate policies are not new, but historical, and have served the nation well.

"But now these new—and I can only call them selfish—interests have appeared with the clear intention of under-pricing in those special areas in which regulators have heretofore kept the prices higher; kept them higher in order to provide lower, though reasonable, charges for the great body of household telephone users across the country. Such competition may be good for these special interest entities which are not at all adverse to competing with a regulated system. But it is not good, in my opinion, for the American public, especially the part of it which is economically disadvantaged—the unfortunate. It ties the regulator's hands as he attempts to set rates which will meet overall public interest standards—and especially the needs of the poor, the elderly, and the ill.

"To allow selective entry into this market by, for example, the specialized common carrier can only result in a further dislocation of present tenuous regulatory rate options. Regulators would then have no choice but to give greater weight than formerly to the cost of serving each class of customer with the result that a steeper rate of increase to the lower-income telephone user would be inescapable. Some may ask, 'What's wrong with that? This customer is only being asked to pay his fair share—what it costs to serve him.' What, in my opinion, is wrong with it is that it lacks the input of responsible government with a social conscience—without which a government will not long be governing."

mission go far beyond anything contemplated by those decisions. Thus, equipment suppliers have asked the Commission to go beyond liberalization of the rules by which users can connect equipment to the network and to require the Bell System companies to buy a larger part of their own equipment needs directly from outside suppliers, without regard to the costs of that equipment relative to equipment manufactured by the Bell System for itself through Western Electric, its manufacturing and supply arm.[10] Specialized common carriers sought a similar extension of the *Specialized Common Carrier* decision, asking that the Commission permit them in the areas they choose to serve to provide not only specialized private line services but also the switched message network services provided by the general service carriers.[11]

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[10] ITT, for example, urged in Phase II of Docket No. 19129 (*AT&T, Charges for Interstate Telephone Service*, FCC 76D-41 (Aug. 2, 1976)), that the Bell System's policy of buying the highest quality equipment at the most reasonable cost be modified by a purchasing plan under which it would be forced to buy fixed percentages of its facilities and equipment from outside suppliers. As the Administrative Law Judge in that proceeding pointed out (slip op., p. 59):

> "In short, ITT unabashedly wants the Commission to establish a quota system that would bind Bell's management to purchase 'at least one-third of the Bell System's requirements' from the general trade manufacturers by the end of five years, etc. (ITT Proposed Conclusions, para. 27)."

[11] MCI Telecommunications, for example, has repeatedly attempted to obtain FCC authorization to provide switched message network service. See, *e.g.*, *Letter to MCI Telecommunications Corp.*, 34 P&F Radio Reg. 2d 539 (1975); *MCI Telecommunications Corp., Investigation into the Lawfulness of Tariff FCC No. 1 Insofar as It Purports to Offer Execunet Service*, 60 F.C.C.2d 25 (1976); *MCI Telecommunications Corp., Revisions to Tariff FCC No. 1*, FCC 76-880 (Sept. 28, 1976). Southern Pacific Communications has also attempted to provide switched message network services. See *Southern Pacific Communications Co. Tariff FCC No. 4*, FCC 76-881 (Sept. 28, 1976).

The controversy with respect to the implementation of the *Carterfone* and *Specialized Common Carrier* decisions has produced numerous administrative proceedings before the FCC and state regulatory agencies in which the Commission's decisions have been elucidated and implementation policies gradually evolved to define the rights and obligations of the general service carriers vis-a-vis the new participants in the telecommunications industry. During this period, the Commission has ruled upon various matters growing out of its *Carterfone* and *Specialized Common Carrier* decisions in more than 50 different major proceedings.[12] State regulatory agencies have similarly been deluged with such administrative disputes. During the course of these proceedings, the FCC and the state regulatory agencies have explored virtually every aspect of the business of providing common carrier telecommunications service, including the pricing policies of the general service carriers,[13] their interconnection policies, both with respect to customer-provided equipment and

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[12] A listing of principal FCC decisions over the past eight years relating to its terminal equipment and specialized common carrier (including domestic satellite carrier, radio common carrier, and miscellaneous common carrier) policies is set forth in Appendix D to this petition.

[13] See, *e.g.*, *AT&T, Charges, Regulations, Classifications and Practices for Voice Grade/Private Line Service (High Density-Low Density)*, 55 F.C.C.2d 224 (1975), 58 F.C.C.2d 362 (1976); *AT&T, Investigation into the Lawfulness of Tariff No. 267, Offering a Dataphone Digital Service Among Five Cities*, FCC 76D-34 (July 2, 1976) (Initial Decision); *AT&T, Revisions of Tariff FCC No. 260 Private Line Services, Series 5000 (TELPAK)*, 38 P&F Radio Reg. 2d 1121 (1976); *Pacific Tel. & Tel. Co.* v. *Southern Pac. Communications Co.*, Case No. 9728 (Cal. Pub. Util. Comm'n, Mar. 4, 1975), concerning the pricing of private line services, and *Mountain States*

other common carriers,[14] their vertically integrated structure and procurement practices,[15] and their rate structures and rate levels, including their permissible overall rate of return.[16]

Tel. & Tel. Co., Case No. 5703 (Colo. Pub. Util. Comm'n, Nov. 30, 1976); *Southwestern Bell Tel. Co.*, Docket No. 105712-U (Kan. Corp. Comm'n, Apr. 26, 1976); *New York Tel. Co.*, 12 P.U.R.4th 446 (N.Y. Pub. Serv. Comm'n 1975), concerning the pricing of terminal equipment.

[14] See, *e.g.*, *Interstate and Foreign MTS and WATS*, 35 F.C.C.2d 539 (1972), 56 F.C.C.2d 593 (1975), 58 F.C.C.2d 736 (1976), 59 F.C.C.2d 83 (1976), FCC 76-928 (Oct. 18, 1976); *Slavin* v. *Southwestern Bell Tel. Co.*, 8 P.U.R. 4th 624 (Mo. Pub. Serv. Comm'n 1975); *Pacific Tel. & Tel. Co.*, Docket No. 9625 (Cal. Pub. Util. Comm'n, Apr. 22, 1975); *Rochester Tel. Co.*, 94 P.U.R.3d 370 (N.Y. Pub. Serv. Comm'n 1972), concerning terminal equipment interconnection, and *Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers*, 46 F.C.C.2d 413 (1974), *aff'd sub nom. Bell Telephone Co. of Pa.* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974); *AT&T, Offer of Facilities for Use by Other Common Carriers*, 52 F.C.C.2d 727 (1975), *aff'd sub nom. Carpenter* v. *FCC*, 539 F.2d 242 (D.C. Cir. 1976); *AT&T, Restrictions on Interconnection of Private Line Services*, 60 F.C.C.2d 939 (1976); *United Video, Inc.*, Cause No. 24892 (Okla. Corp. Comm'n, Nov. 14, 1974), 13 P.U.R.4th 457 (Okla. Corp. Comm'n 1976), concerning interconnection with specialized and other common carriers.

[15] See, *e.g.*, *AT&T, Charges for Interstate Telephone Service (Phase II)*, FCC 76D-41 (Aug. 2, 1976); *General Tel. Co. of the Midwest* v. *Public Serv. Comm'n*, 537 S.W.2d 655 (Mo. Ct. App. 1976); *New England Tel. & Tel. Co.* v. *Public Util. Comm'n*, 358 A.2d 1 (R.I. 1976); *Pacific Northwest Bell Tel. Co.* v. *Sabin*, 534 P.2d 984 (Ore. Ct. App. 1975); *New England Tel. & Tel. Co.*, 13 P.U.R.4th 65 (Me. Pub. Util. Comm'n 1976).

[16] See, *e.g.*, *AT&T, Charges for Interstate Telephone Service (Phase I)*, 38 F.C.C.2d 213, 38 F.C.C.2d 492 (1972), 38 F.C.C.2d 984 (1973), 42 F.C.C.2d 293 (1973), *aff'd sub nom. Nader* v. *FCC*, 520 F.2d 182 (D.C. Cir. 1975); *AT&T, Charges for Interstate Telephone Service*, 57 F.C.C.2d 960 (1976); *Illinois Bell Tel. Co.*, 13 P.U.R.4th 482 (Ill. Commerce Comm'n 1976); *Chesapeake & Potomac Tel. Co. of Va.*, 10 P.U.R.4th 255 (Va. Corp. Comm'n 1975); *Northwestern Bell Tel. Co.*, 299 Minn. 1, 216 N.W.2d 841 (1974).

The Proceedings in the District Court

Notwithstanding the fact that virtually every conceivable aspect of the FCC's *Carterfone* and *Specialized Common Carrier* decisions was involved in pending regulatory proceedings, on November 20, 1974, the Government filed a complaint against petitioners under Section 2 of the Sherman Act. The complaint essentially is designed to litigate under an antitrust standard the very matters related to the *Carterfone* and *Specialized Common Carrier* decisions that were being litigated and resolved before the regulatory agencies under the public interest standard.

The Government's complaint alleges that petitioners have monopolized, and conspired and attempted to monopolize, interstate trade and commerce in telecommunications service and equipment markets. The complaint is thus aimed directly at the common carrier activities of the Bell System: the monopolization of telecommunications service that is alleged relates solely to services provided to the public by the Bell System subject to pervasive common carrier regulation; the monopolization of telecommunications equipment that is alleged relates solely to equipment used by the Bell System in furnishing such regulated services. The Government's basic theory appears to be that the Bell System somehow violated Section 2 of the Sherman Act by the tariffs which it filed, the practices and procurement policies which it followed in providing telecommunications services, the positions that it advocated before regulatory agencies and certain other practices in which it allegedly engaged during the industry-wide controversy over the FCC's *Carterfone* and *Specialized Common Carrier* decisions.

The resolution of these disputes before the appropriate regulatory agencies under the public interest standard has already involved an enormous dedication

of resources;[17] the time and expense required to relitigate these same disputes under the competition standard of the Sherman Act would be staggering. The Government has filed an initial wave of discovery requests in which it has sought to obtain from each of the Bell System companies all of the information in its files or in the knowledge of any of its officers and employees with respect to the policies pursued, practices followed and positions taken by the Bell System in connection with every major regulatory matter that has arisen during the past decade. Moreover, on the theory that Section 2 of the Sherman Act defines a "contextual" offense, the Government has indicated that it intends to prove that the Bell System has engaged in a continuing course of conduct *since its inception* to monopolize the markets alleged. Consequently, the Government has asked for the production of documents going back almost a century in time and has raised issues that will require production of material from, and studies and analyses with respect to virtually everything in, the archives of the Bell System.[18] A study undertaken upon the receipt of those initial discovery requests produced an estimate that they would require the production of *1.2 billion* pages of materials and that it would cost the Bell System *in excess of $300 million* simply to search its files in order to produce those documents.[19]

Even these estimates may substantially understate the ultimate burden of discovery in this case. In light of the scope and nature of the Government's complaint, petitioners filed their own request seeking the production of documents from the Government. A principal purpose of petitioners' request, which necessarily will substantially increase both the volume and burden of discovery in this case, is to place the charges

[17] For example, Phase II of FCC Docket No. 19129—a proceeding dealing, among other things, with "all ramifications of the relationship of Western Electric to the Bell System and its effect upon telephone rates and revenue requirements" (*AT&T, Charges for Interstate Telephone Service*, 38 F.C.C.2d 213, 244 (1972))—involved 103 hearing days, 16,437 pages of transcript, 15,864 pages of exhibits, and the testimony of 43 witnesses. *AT&T, Charges for Interstate Telephone Service*, FCC 76D-41, slip. op. at 8 (Aug. 2, 1976) (Initial Decision). That proceeding cost the Bell System an estimated $5,939,000 and the FCC Trial Staff an estimated $4,000,-000 (*id.*) and required the Trial Staff to maintain an average staff for the case of 45 people (*id.* at 5) in addition to employing 20 professional-person years of the time of outside management consultants (*id.* at 6).

[18] The Government does not and cannot contend that these historical matters could of themselves establish a violation of the Sherman Act. In 1949 the Department of Justice charged AT&T and Western Electric with violations of the Sherman Act based upon the Bell System's structure and its activities in several related, but unregulated, industries. *United States* v. *Western Electric Co.*, Civil Action No. 17-49 (D.N.J.). That case was terminated in 1956 with the entry of a consent decree which required the Bell System to cease doing any business (except with the Federal Government) other than providing common carrier communications services subject to regulation by the FCC and state regulatory agencies, and the manufacture of equipment of the kind used for that purpose. See *United States* v. *Western Electric Co.*, 1956 Trade Cases ¶ 68,246 (D.N.J. Jan. 24, 1956) (Final Judgment). See also Statement of Judge Stanley N. Barnes, Assistant Attorney General, Department of Justice Press Release (Jan. 24, 1956), reprinted in *Hearings on the Consent Decree Program of the Dept. of Justice Before the Antitrust Subcomm. of the House Judiciary Comm.*, 85th Cong., 2d Sess., ser. 9, pt. 2, vol. I, at 1865 (1958). To avoid the res judicata effect of the 1956 consent decree on certain of the structural allegations in the present complaint, counsel for the Government stated at the July 23, 1975, oral argument in the district court that the present case "is predicated entirely upon activities which have occurred after 1956" (Tr. p. 59) and not upon the Bell System's conduct prior to 1956 or upon the System's integrated structure and internal relationships which have existed, essentially unchanged in every material respect, from long prior to 1956 until the present time.

[19] Affidavit of F. Fox Stoddard, AT&T Assistant Vice President, filed in the district court in this case on February 18, 1975.

made by the Government in their proper governmental and regulatory context. Thus, the unusual character of this case, involving as it does matters that have already been litigated in massive detail before regulatory agencies, has not only led the Government to file document requests of unprecedented proportions, but has forced petitioners to prepare for their defense in a way that further exacerbates the problems of discovery and trial.

The burdens of such litigation plainly cannot be limited to the parties directly involved. The Government has already filed subpoenas against ten non-party companies in the telecommunications industry and has indicated that it will file hundreds of additional subpoenas. Again, petitioners are forced to respond with their own subpoenas, all of which will require production of literally tens of millions of documents setting forth in detail the background of the many disputes that have been presented for resolution by regulatory agencies over the past decade.[20]

Against the background of all of the events involved, even a cursory review of the Government's complaint and discovery requests makes it plain that the discovery and trial of this case would be the most massive undertaking in the history of the American judicial system. If all the charges made by the Government are actually

[20] The parties have recently entered into an agreement, approved by the district court, adopting discovery procedures for this case designed to reduce somewhat the costs of document production for both sides. This agreement, however, is necessarily experimental and subject to change if the procedures adopted prove unsatisfactory to either party. It is not possible at this stage to predict what the ultimate burdens of discovery will be under these tentative procedures. However, it is clear that these burdens will be enormous, in terms both of the amount of material involved and of the costs that necessarily will be incurred.

tried under the rule of reason test of Section 2 of the Sherman Act, this case will be immensely more complex and time-consuming, for example, than the antitrust litigation now pending against IBM in the United States District Court for the Southern District of New York[21]—a case in which the Government's complaint was filed on January 19, 1969, and in which the trial itself has been going on for almost two years and the Government has not yet completed presentation of its case in chief. The number of documents and depositions likely to be involved in this case are certain to exceed those involved in the *IBM* case[22] and virtually certain to dwarf anything that previously has been involved in any case.

Yet there is a serious question as to whether the district court has jurisdiction over this case. On February 20, 1975, when the parties first appeared before the district court, that court on its own motion took note of the affirmative defenses in the answer to the complaint in which petitioners raised the question of the absence of antitrust jurisdiction by challenging the jurisdiction of the court over the subject matter of the action and asserting the failure of the complaint to state a claim upon which relief can be granted. The district court directed the parties to brief the jurisdictional issues before discovery was commenced. The

[21] *United States* v. *International Bus. Mach. Corp.*, 69 Civ. 200 (S.D.N.Y., filed Jan. 19, 1969).

[22] The complaint in the *IBM* case challenges a much smaller portion of the defendant's activities than the complaint in this case, and the complications of pervasive regulation are absent from *IBM* since the computer industry is not regulated. The *IBM* case thus did not involve any time-consuming and costly referrals to regulatory agencies under the doctrine of primary jurisdiction—a procedure specifically contemplated by the district judge in this case (App. A, p. 10a).

parties submitted memoranda on March 24, 1975, and April 3, 1975, and the district court set the jurisdictional issues for oral argument on July 23, 1975. Following that argument, the court requested the Federal Communications Commission to submit a memorandum as *amicus curiae* setting forth its views on the jurisdictional issues before the court. The Commission filed a memorandum on December 30, 1975, and the parties filed responsive memoranda on January 29, 1976. Subsequently, by order of October 1, 1976, the district court invited the parties and the FCC to file still further memoranda and set the case for further argument on November 16, 1976.[23]

At the close of the November 16th argument, the court issued an oral statement from the bench upholding its jurisdiction over the Government's complaint and indicating that a written opinion would follow. On November 24, 1976, the Court issued the Memorandum Opinion and Order on Jurisdictional Issues which is annexed hereto as Appendix A. In order to remove any procedural uncertainty that might otherwise have arisen from the fact that no formal motion to dismiss had been filed, petitioners filed such a motion on December 22, 1976, which the district court denied on the same date "for the reasons set forth in the Memorandum Opinion and Order on Jurisdictional Issues, entered by the Court on November 24, 1976" (App. B, p. 12a.).

[23] As originally framed by the district court, the jurisdictional issues to be briefed included a question as to the res judicata effect of the 1956 Final Judgment (see *supra*, note 18) and the possible need, in light of that judgment, to transfer this case to the United States District Court for the District of New Jersey, which exercises continuing jurisdiction over the 1956 judgment. In its October 1, 1976 order the district court held, presumably in light of the Government's concession that this case is limited to conduct since 1956, that the complaint is not barred by the 1956 judgment and need not be transferred to the New Jersey court.

The district court's opinion does not adequately or correctly deal with the jurisdictional issues involved in this case. The opinion is based primarily upon the decisions of this Court in *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973), and *United States* v. *Radio Corp. of America,* 358 U.S. 334 (1959), in both of which cases this Court upheld antitrust jurisdiction because—and only because—pervasive common carrier regulation was *not* involved. At the same time, the opinion ignores the effect of the decisions of this Court holding, where pervasive regulation *was* involved, that antitrust immunity must be implied.

As we shall show in Part II of this petition, the decision of the district court is clearly in error. Consequently, for the reasons set forth in Part I of this petition, this Court should exercise its power under the All Writs Act directly to review and to correct the error of the district court in order to avoid the burdens of this litigation upon the judiciary, the parties, non-parties and the public, to prevent frustration of the policies underlying the Communications Act during the many years in which this case will otherwise be pending and to promote the orderly administration of justice consistent with the decisions of this Court and the policy of Congress.

REASONS FOR GRANTING THE WRIT

I. THE ISSUANCE OF THE WRIT IS NECESSARY TO ASSURE THE ORDERLY ADMINISTRATION OF JUSTICE, TO PROTECT THE PARTIES FROM THE UNIQUE BURDENS OF THIS POINTLESS LITIGATION AND TO PREVENT FRUSTRATION OF THE POLICIES OF THE CONTROLLING REGULATORY STATUTES.

Direct review of the orders of the district court under the All Writs Act, 28 U.S.C. § 1651(a), or, in the

alternative, certiorari before judgment under 28 U.S.C. § 1254(1), would further the policies underlying all of the statutes relevant to the question now before the Court—that is, the policy of the All Writs Act itself, the policy of the Expediting Act which governs appeals in antitrust suits filed by the Government, and the policy of the Communications Act of 1934 and comparable state statutes, under which the activities of telecommunications common carriers are pervasively regulated.

This Court unquestionably has the power under both the All Writs Act [24] and 28 U.S.C. § 1254(1) [25] to review directly decisions of a district court involving a question of the nature of that presented here. Petitioners recognize that the Court will exercise these powers only where questions of general importance are presented and only where the orderly administration of justice requires the Court to resolve such questions under extraordinary procedures. However, petitioners submit that this is precisely the kind of case for which the All Writs Act and the power of the Court to review before judgment cases pending in the courts of appeals were designed.

The decisions of this Court plainly establish that review by certiorari is appropriate where, as in the

[24] See, *e.g.*, *United States Alkali Export Association, Inc.* v. *United States*, 325 U.S. 196 (1945); *Far East Conference* v. *United States*, 342 U.S. 570 (1952); *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212 (1945); *United States* v. *National City Lines, Inc.*, 337 U.S. 78 (1949); *Ex parte Peru*, 318 U.S. 578 (1943); *Ex parte United States*, 287 U.S. 241 (1932).

[25] *United States* v. *Nixon*, 418 U.S. 683 (1974); *New Haven Inclusion Cases*, 399 U.S. 392 (1970); *United States* v. *United Mine Workers*, 330 U.S. 258 (1947); *Railroad Retirement Board* v. *Alton R.R. Co.*, 295 U.S. 330 (1935).

present case, the question presented goes to the jurisdiction of a district court to entertain an antitrust complaint with respect to matters subject to regulation by a federal agency; where, as here, review by appeal is foreclosed by the Expediting Act; and where, as here, a failure to review the decision below prior to final judgment would result in serious hardship from protracted and potentially unnecessary litigation and in frustration of the congressional policy embodied in the regulatory scheme. This was the precise holding of this Court in *United States Alkali Export Association, Inc.* v. *United States*, 325 U.S. 196 (1945).

In *United States Alkali,* the Court exercised its power to review by extraordinary writ of certiorari an interlocutory order denying petitioners' motion to dismiss an antitrust complaint brought by the United States on the ground that the charges involved related to matters that were within the exclusive jurisdiction of the Federal Trade Commission under the Webb-Pomerene Act. In explaining its exercise of the extraordinary jurisdiction conferred upon it by the All Writs Act, the Court in *United States Alkali* pointed out that review of the district court's order by appeal was foreclosed by the Expediting Act since the order was not a final judgment. The Court held, however, that the Expediting Act did not in any way limit the power of the Court to issue writs prior to final judgment in aid of its ultimate appellate jurisdiction, and that jurisdictional questions of the nature involved in that case were peculiarly appropriate for review by writ of certiorari under the All Writs Act (325 U.S. at 204):

> "The hardship imposed on petitioners by a long postponed appellate review, coupled with the at-

> tendant infringement of the asserted Congressional policy of conferring primary jurisdiction on the Commission, together support the appeal to the discretion of this Court to exercise its power to review the ruling of the district court in advance of final judgment."[26]

The decision of this Court in *United States Alkali* is *a fortiori* applicable to the situation presented in this case. Given the unprecedented magnitude of this case and the likely ten-year period in which it will otherwise be pending prior to ultimate resolution, the burdens of potentially unnecessary discovery and trial faced by the parties here are far greater than those faced by the parties in *United States Alkali*. Furthermore, since the Bell System is a pervasively regulated public utility enterprise, the enormous costs incurred in defending this case, as well as those incurred by the Department of Justice in prosecuting it and by the courts in adjudicating it, will ultimately be borne by the general public. The possibility that at the end of this entire process this Court will hold that the district court never had jurisdiction over the Government's complaint suggests that this case could be a legal travesty—a waste of public and private resources to no valid or proper end whatever.[27]

[26] The *United States Alkali* decision was followed by this Court in *Far East Conference* v. *United States*, 342 U.S. 570 (1952), to review by writ of certiorari under the All Writs Act the district court's denial of defendant's motion to dismiss the Government's antitrust claims in that case because of the jurisdiction of the Federal Maritime Board over those matters under the Shipping Act. See also *De Beers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212 (1945); *United States* v. *National City Lines, Inc.*, 337 U.S. 78 (1949). *Cf. Atlantic Coast Line R.R. Co.* v. *Riss & Co.*, 267 F.2d 657 (D.C. Cir. 1958).

Moreover, the "infringement of the asserted congressional policy" embodied in the regulatory statute during the pendency of the action is also far more serious here than it was in the *United States Alkali* case. Uncertainty concerning the jurisdictional question presented here during the many years in which this antitrust proceeding would be pending against the enterprise providing most of the common carrier telecommunications service in this country would seriously impair the operation of the Communications Act as intended by Congress as well as the operation of the complementary statutes enacted by state legislatures. As is set out in greater detail below, the Communications Act and the comparable state statutes under which the Bell System's common carrier activities are regulated are necessarily premised upon the assumption that common carriers will follow a public interest standard—not a competition standard—in the activities in which they engage subject to pervasive regulatory supervision. In order to protect themselves against the contingent liabilities to which they might be exposed by the decision of the district court, however, petitioners would necessarily be pushed toward conforming all of their policies and practices to the unidimensional competition standard of the antitrust

[27] Pertinent here are the remarks of Mr. Chief Justice Burger dissenting in *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 389-90 (1973):

> "The history of this cause is so remarkable—indeed unique in the annals of modern federal jurisprudence, so far as I am aware—that I must preface my dissent on the merits with a recital of the course of this litigation over nearly a dozen years. This protracted litigation, conducted at enormous cost, now comes to an abrupt end on an issue directly presented to this Court nearly eight years ago but not decided. As the strange

laws—even where competition cannot possibly serve the public interest.[28]

Such a situation could have seriously adverse consequences to the nationwide telecommunications network during the next decade. Telecommunications is one of the most dynamic industries in the country. The industry is faced in the near future with the certainty of rapid and drastic change, both technologically and economically. Indeed, the country is on the brink of a telecommunications revolution, with a waveguide tech-

history will demonstrate, resolution of the issue when it was first before the Court, as now decided, would have terminated this litigation without having the parties invest untold efforts and vast expense in a now wholly irrelevant contest over the proper measure of damages."

[28] In the *amicus curiae* memoranda which it submitted at the request of the district court, the FCC suggested that the assertion of antitrust jurisdiction need not interfere with its own jurisdiction so long as there was no direct conflict with its orders. This view of the applicability of the antitrust laws is unrealistically narrow and directly in conflict with this Court's decisions in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), and *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975). In any event, as the Court made it plain in *Gordon*, the question of antitrust jurisdiction is one to be resolved by the courts, not by regulatory agencies (422 U.S. at 686). Hence, it is not surprising that this Court has on at least three separate occasions found that the antitrust laws would render a regulatory scheme unworkable, notwithstanding the fact that the regulatory agency involved did not oppose, and in some cases supported, the assertion of antitrust jurisdiction. See *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 327-28 (1963); *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 409 (1973); *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 704 (1975). See also *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), in which the Court upheld antitrust jurisdiction even though the Federal Power Commission urged that application of the antitrust laws would render the Federal Power Act unworkable.

nology already perfected through the use of which as many as a quarter of a million telephone conversations could be carried simultaneously in a pipe no larger than two inches in diameter, and with an optical fiber transmission technology in the developmental stage which could replace waveguide in many of its possible uses even before it is placed in service. Moreover, there are additional transmission and switching technologies, some of which are already being implemented, that may in the near future change the whole nature of the business of providing telecommunications services. The ultimate use of these technologies, in the development of which Bell Telephone Laboratories is the acknowledged leader, should be governed by the public interest standard administered by the agencies responsible for common carrier regulation. If the antitrust laws are injected into this field as the controlling standard, however, no one can now predict whether or how such technologies will be introduced.[29]

There are further considerations, beyond those present in *United States Alkali*, which warrant immediate review of this case by this Court. The decision of the

[29] Most of these technologies are inherently monopolistic in that they demonstrate potentially vast economies of scale, thereby creating the possibility for substantially reduced costs of telecommunications service if—but only if—the demand for such service can be aggregated over a single system. The costs of implementing some of the technologies would be enormous. However, when the full capacity of such systems is realized, the unit cost per telephone circuit will be far less than the costs of the systems in use today. In these circumstances, the question of whether, as well as the question of when, these new technologies can economically be implemented into the nationwide telecommunications network might well depend in significant part on resolution of the applicability of the antitrust laws to the provision of common carrier telecommunications services.

district court raises an important question concerning the relationship between the Sherman Act and the Communications Act and comparable state regulatory statutes which is presently at issue in over thirty private antitrust suits pending in seven different circuits.[30] Each of these cases involves some, and collectively they involve virtually all, of the same allegations as this case. A substantial number of these cases are in themselves massive antitrust cases requiring many years and many millions of dollars to prepare and adjudicate. The precise jurisdictional question involved here and in all of these pending cases has never been directly decided by this Court as to telecommunications common carriers, and the reported decisions of the lower courts which have passed on the question have taken every possible position—some finding the antitrust laws displaced by regulation,[31] some indicating that the antitrust laws might be applicable despite regulation,[32] and others invoking the doctrine of primary jurisdiction as a prerequisite to passing on the exclusive jurisdiction question.[33] This case is thus most appropriate for review by writ of certiorari in order to formulate the necessary guidelines for resolution of an important issue of law presently confronting a number of lower courts before the parties and the courts are forced to undergo many lengthy and expensive trials which may ultimately turn out to have been pointless. See *Schlagenhauf* v. *Holder,* 379 U.S. 104, 111-12 (1964).

In these circumstances, petitioners submit that the standards previously applied by this Court for the issuance of a writ of certiorari under the All Writs Act are amply satisfied. The only possibly distinguishing factor between this case and the *United States Alkali* case arises from the fact that, since the decision in *United States Alkali,* the Expediting Act has been amended to permit appellate review in government civil antitrust cases by the courts of appeals as well as by this Court. But the 1974 amendments to the Expediting Act in no sense constitute a determination by Congress that all review proceedings in government antitrust cases should go initially to the courts of appeals. Quite the contrary, those amendments provide a flexible procedure designed to permit direct review by this Court of the most significant cases and of cases presenting important legal issues, while leaving review of relatively trivial cases and of some cases involving a need to review complex findings in light of a massive factual record initially to the appropriate court of appeals.

This change in the law applicable to the review of government civil antitrust cases does not in any way undercut either the power of this Court to review interlocutory orders in these cases under the All Writs Act

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[30] Such private antitrust cases are presently pending against the Bell System in the First, Second, Fifth, Seventh, Eighth, Ninth and District of Columbia Circuits.

[31] See, *e.g., Jeffrey* v. *Southwestern Bell,* 518 F.2d 1129 (5th Cir. 1975); *Business Aides, Inc.* v. *Chesapeake & Potomac Tel. Co. of Va.,* 480 F.2d 754 (4th Cir. 1973); *Lamb Enterprises, Inc.* v. *Toledo Blade Co.,* 461 F.2d 506 (6th Cir.), *cert. denied,* 409 U.S. 1001 (1972). *Cf. CSI/Communication Systems, Inc.* v. *South Central Bell Tel. Co.,* 346 F. Supp. 487 (E.D. Tenn. 1971).

[32] See, *e.g., Litton Systems, Inc.* v. *Southwestern Bell Tel. Co.,* 539 F.2d 418 (5th Cir. 1976); *Macom Products Corp.* v. *American Tel. & Tel. Co.,* 359 F. Supp. 973 (C.D. Cal. 1973).

[33] See, *e.g., Industrial Communications Systems, Inc.* v. *Pacific Tel. & Tel. Co.,* 505 F.2d 152 (9th Cir. 1974); *Carter* v. *American Tel. & Tel. Co.,* 365 F.2d 486 (5th Cir. 1966), *cert. denied,* 385 U.S. 1008 (1967); *Chastain* v. *American Tel. & Tel. Co.,* 351 F. Supp. 1320 (D.D.C. 1972), 401 F. Supp. 151 (D.D.C. 1975); *Radio Broadcasting Co.* v. *Bell Tel. Co. of Pa.,* 325 F. Supp. 168 (E.D. Pa. 1971).

or, in cases of this magnitude presenting questions of the kind involved here, the standards by which the Court's discretion should be exercised.[34] The question presented by this petition for certiorari is clearly one which, even under the amended Expediting Act, this Court should review in the first instance. If the district court had dismissed this case on jurisdictional grounds, there can be little doubt that this question could and would have been brought directly to this Court. None of the considerations that underlie the need for intermediate appellate review would have been present in such a situation, and none of them are present here. The Court is not confronted with a massive record to review or the need to determine whether trial court findings are supported by the evidence. The question presented here is purely a legal question which can and should be resolved ultimately only by this Court; hence, intermediate appellate review could only delay review by this Court which ultimately is needed in any event. The procedure suggested herein therefore is entirely consistent with, and indeed furthers, the policies of the Expediting Act.

Moreover, the same considerations that support the reviewability of the orders in this case under the All Writs Act and 28 U.S.C. § 1254(1) strongly militate toward direct review by this Court. The ordinary course of appellate review, including intermediate review by the court of appeals, could itself require two years for completion. Petitioners believe that it is in the interest of all concerned to resolve the fundamental question presented here more promptly than that. If petitioners' position on that question is correct, the burden of discovery can largely be avoided[35] and the period of uncertainty that threatens the efficient administration of the Communications Act can be kept to a minimum. As pointed out above, petitioners are prepared to cooperate to the fullest to achieve this plainly desirable end.

[34] The legislative history of the 1974 amendments to the Expediting Act (88 Stat. 1706), reviewed at length by Judge Friendly in *Kaufman* v. *Edelstein*, 1976-1 Trade Cases ¶ 60,841 at 68,667-68 (2d Cir. 1976), clearly establishes that these amendments were not intended in any way to prevent review of interlocutory orders in government civil antitrust cases by writs issued under the All Writs Act.

In its Memorandum Opinion and Order of November 24, 1976, the district court itself expressed the view that "the jurisdictional defenses raised in the answer to the complaint were threshold matters which should be resolved before the expensive and protracted discovery inherent in the nature of this case was undertaken by the parties" (App. A, p. 2a). The concern of the petitioners here is to do precisely that—to resolve as soon as possible the jurisdictional question which concerned the district court and which is inherent in any effort to apply the provisions of Section 2 of the Sherman Act to pervasively regulated activities of a common carrier enterprise. As will be shown in Part II of this petition, both under the prior decisions of this Court and in order to effectuate the regulatory policies involved, this question ought to be decided contrary to the decision of the district court below and in favor of the position advocated by petitioners.

[35] Discovery in this case was stayed by the district court on its own motion on February 20, 1975, pending resolution of the jurisdictional issues. Following the court's memorandum opinion and order of November 24, 1976, the parties entered into a discovery agreement, subsequently approved by the court, which sets March 1, 1977, as the target date for the commencement of document production. Because of the lengthy delay in discovery already experienced in this case, petitioners would not intend to seek a further stay of discovery if this Court reviews the case under the procedures suggested herein.

II. THE GOVERNMENT'S CHARGES IN THIS CASE DO NOT PROVIDE A PROPER BASIS FOR THE ASSERTION OF ANTITRUST JURISDICTION SINCE ALL THOSE CHARGES RELATE TO MATTERS WITHIN A PERVASIVE SCHEME OF COMMON CARRIER REGULATION PREMISED UPON A STANDARD DIFFERENT FROM AND IRRECONCILABLE WITH THE COMPETITION STANDARD OF THE ANTITRUST LAWS

Despite the complexity that would be inherent in any trial of this case under the rule of reason test of Section 2 of the Sherman Act, the fundamental jurisdictional question presented by this petition is one as to which petitioners' position can be simply stated. As petitioners shall demonstrate below, both the basic monopolization charges upon which the Government's complaint is grounded and each of the specific charges through which the Government seeks to sustain these basic charges relate to matters that are subject to pervasive common carrier regulation by the FCC and state regulatory agencies. Consequently, this case falls squarely within the principle—established by and consistently recognized in the decisions of this Court—that activities subject to pervasive regulation cannot be made the subject of antitrust liability under the Sherman Act. *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973); *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975).

This principle, which is based upon the fundamental repugnancy between the legislative policy underlying a scheme of pervasive regulation under a public interest standard and the unidimensional concept of competition embodied in the antitrust laws, is *a fortiori* applicable to telecommunications common carrier activities.

The inapplicability of the antitrust laws to pervasively regulated activities of telecommunications common carriers is apparent, first, from a comparison of the provisions of Title II of the Communications Act with the statutory schemes involved in prior cases in which this Court has found implied antitrust immunity—specifically, the provisions applicable to airline carriers under the Federal Aviation Act and the provisions applicable to mutual fund dealers under the Investment Company Act of 1940 and the Maloney Act. Such a comparison reveals that telecommunications common carriers are *more* pervasively regulated than either mutual fund dealers or airline common carriers.

Indeed, the regulation of telecommunications common carriers is the most stringent and pervasive established by any federal regulatory scheme. This Court has itself recognized the far less pervasive character of federal regulation of the electric power transmission, broadcasting, banking and natural gas transmission industries. *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 373-74 (1973); *United States* v. *Radio Corporation of America*, 358 U.S. 334, 348-49 (1959); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 352 (1963); *California* v. *FPC*, 369 U.S. 482, 485 (1962). *Cf. Cantor* v. *Detroit Edison Co.*, 96 S. Ct. 3110, 3120 n.37 (1976). The only industries that approach telecommunications common carriers in the extent of the regulation to which they are subject are those industries also regulated as common carriers. An analysis of even these statutes shows that none of them establishes a regulatory scheme as pervasive as Title II of the Communications Act.

Moreover, the background and legislative history of the Communications Act show plainly that Congress intended by Title II of the Act to establish a system of regulation entirely different from a competitive sys-

tem—a fact which, more clearly than anything pointed to in the legislative history of the statutes involved in any other case that has come before this Court, reflects a deliberate intent on the part of Congress that the activities subjected to pervasive regulation *not* be subjected at the same time to the threat of antitrust liability.

Finally, it is plain that application of the antitrust laws to the activities involved in this case would be plainly repugnant to the regulatory scheme established by Title II of the Communications Act and comparable state statutes. None of these regulatory statutes would work as intended if the antitrust laws are applied to the very activities which they were enacted to regulate. See *Gordon* v. *New York Stock Exchange, Inc.,* 422 U.S. 659 (1975); *United States* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694 (1975); *Cantor* v. *Detroit Edison Co.,* 96 S. Ct. 3110, 3120 n.37 (1976).

The Government's efforts to impose antitrust liability upon petitioners on the basis of the charges in this case cannot be squared with the prior decisions of this Court establishing the principle that the antitrust laws do not apply to the pervasively regulated activities of common carriers. The Government's heavy reliance upon the existence of some carrier initiative under Title II of the Communications Act certainly does not provide such a ground of distinction. All regulatory statutes contain some element of private initiative, and this Court has repeatedly recognized that the inclusion in a pervasive regulatory scheme of initiative to be exercised by the regulated company subject to ultimate agency control does not imply a decision by Congress that the exercise of such initiative was to be made the subject of antitrust liability under a competition standard. *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296 (1963); *Hughes Tool Co.* v. *Trans World Airlines, Inc.,* 409 U.S. 363 (1973); *United States* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694 (1975). *Cf. Gordon* v. *New York Stock Exchange, Inc.,* 422 U.S. 659 (1975).

Nor does the Government's inclusion in the charges it has identified here of a handful of charges of more generalized anticompetitive conduct establish a basis for distinguishing this Court's decisions and asserting antitrust jurisdiction over the pervasively regulated activities of this common carrier enterprise. These charges are well within the supervisory jurisdiction of the regulatory agencies and, at the most, might provide a basis for a much more limited suit. See *Seatrain Lines, Inc.* v. *Pennsylvania R.R. Co.,* 207 F.2d 255, 262 (3rd Cir.), *cert. denied,* 345 U.S. 916 (1953). In the context of this case, however, such charges are plainly ancillary to the Bell System's common carrier activities and, as such, they too should be summarily dismissed. *United States* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694, 733-34 (1975); *United States Navigation Co.* v. *Cunard Steamship Co.,* 284 U.S. 474, 480 (1932).

In petitioners' view this case can and should be disposed of just that simply. However, in view of the importance of this case, and particularly in view of the fact that petitioners have asked the Court to hear this case under a procedure that would treat this petition as petitioners' brief on the merits, each of these points will be developed somewhat more fully than would be the case in an ordinary petition for certiorari.

A. Both the Basic Monopolization Charges Upon Which the Government's Complaint Is Grounded and Each of the Specific Charges Upon Which the Government Has Stated Its Intention to Rely Relate to Matters That Are Subject to Pervasive Common Carrier Regulation by the FCC and State Regulatory Agencies.

As already pointed out above, the Government's complaint in this case is aimed exclusively at the common carrier activities of the Bell System. (For the convenience of the Court, the Government's complaint is annexed hereto as Appendix E.) The proceedings before the district court reinforce and confirm this fact.

In its initial memorandum to the district court, the Government identified thirty separate charges as encompassed within its complaint, each one of which was plainly within the scope of the common carrier functions of the Bell System. The FCC itself recognized this fact in an analysis of the Government's charges presented to the district court in its *amicus curiae* memorandum submitted at the request of the court.[36] (For the convenience of the Court, the FCC's analysis of the thirty charges identified in the Government's initial presentation to the district court is annexed hereto as Appendix F.) Subsequently, the Government submitted a second list of twenty-two charges, including a number of charges not set out in its initial presentation. The stated purpose of this second list of charges was to identify specific activities upon which the Government intends

[36] In its *amicus curiae* memorandum, the FCC stated that "virtually all" of the specific charges identified by the Government are "within its [the FCC's] own regulatory jurisdiction" (FCC Memo., pp. 28-29) and that this jurisdiction had been and was being actively exercised in a number of proceedings that had recently been completed or were then still pending before the Commission (FCC Memo., Addendum C).

to rely that it alleged were beyond the reach of the Communications Act. However, in an exhibit introduced by petitioners at the hearing on November 16, 1976, each of these twenty-two charges was shown to be within the ambit of the regulated common carrier activities of the Bell System and, indeed, subject to active regulation by the FCC. (This analysis, which was accepted in evidence by the district court as defendants' Exhibit No. 1 on the jurisdictional issue, is attached hereto as Appendix G.)

The complaint, as supplemented by the Government's identification in the proceedings before the district court of specific charges intended to be encompassed therein, shows that the Government's basic charges of monopolization are confined to charges with respect to the following specific kinds of matters:

(1) the rates, interconnection provisions, terms and conditions of service and other practices set forth in the Bell System's tariffs for common carrier services;[37]

(2) other, non-tariff practices followed by the Bell System in connection with the provision of its common carrier services;[38]

(3) the policies and practices followed by the Bell System with respect to the procurement of

[37] These matters are encompassed within paragraphs 28(a)(b)(c)(e) and 29(a)(b)(c)(d)(e)(f) of the complaint and include those charges identified by the FCC as numbers 1, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 25, 28 (App. F).

[38] These matters are encompassed within paragraph 28(a)(b)(e) of the complaint and include those charges identified by the FCC as numbers 5, 6, 14, 18, 27, 29 (App. F), and those identified in Exhibit No. 1 as numbers 8, 9, 11, 13, 16, 17, 18 (App. G).

equipment and facilities used to provide common carrier services;[39]

(4) the positions which the Bell System has taken in regulatory proceedings;[40] and

(5) certain unfair or anticompetitive activities allegedly engaged in by the Bell System to discourage users from dealing with other companies offering telecommunications services or equipment.[41]

The basic jurisdictional question presented by this case is whether such a complaint—that is, a complaint against a telecommunications common carrier enterprise based entirely upon monopolization charges with respect to alleged markets in which that enterprise operates only as a common carrier, and one in which the only specific charges advanced are those described above—can properly be held to be within the jurisdiction of an antitrust court. Petitioners' challenge to the existence of such jurisdiction is premised upon the fact that both the Government's basic charges of monopolization and the activities to which the Government has referred as the grounds for its basic charges involve matters that are subject to pervasive regulation by the FCC and state regulatory agencies.

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[39] These matters are encompassed within paragraphs 28(a)(d)(e) and 29(f)(g)(h) of the complaint and include those charges identified by the FCC as numbers 19, 20, 21, 22, 23, 24 (App. F), and those identified in Exhibit No. 1 as numbers 1, 2, 3, 4, 5, 6, 10, 12, 14, 15 (App. G).

[40] These matters are encompassed within paragraph 28(b)(c) of the complaint and include those charges identified by the FCC as numbers 1, 2, 8, 9, 30 (App. F).

[41] These matters are encompassed within paragraph 28(b)(e) of the complaint and include the charge identified by the FCC as number 26 (App. F) and those identified in Exhibit No. 1 as numbers 7, 19, 20, 21, 22 (App. G).

This fact can be demonstrated simply by comparing the charges of the complaint with the pertinent provisions of the Communications Act and comparable state regulatory statutes—a process which the district court did not undertake.

The Government's basic charges of monopolization go to the very heart of the scheme under which telecommunications common carriers are regulated. As this Court has frequently pointed out, the essence of the charge of monopolization is the acquisition or maintenance of control over entry and prices.[42] Yet control over both entry and pricing with respect to the provision of telecommunications common carrier service is vested in the regulatory agencies.

Section 214 of the Communications Act deals broadly with entry into the business of providing interstate common carrier telecommunications services:

> "(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line . . .
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> * * *
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> "(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the applica-

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[42] See, *e.g.*, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 391-92 (1956).

tion, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require . . .

"(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office . . ."

Similar provisions of state regulatory statutes govern the entry of common carriers seeking to provide intrastate and local telecommunications services. See, *e.g., Pacific Tel. & Tel. Co.* v. *Southern Pac. Communications Co.,* Case No. 9728 (Cal. Pub. Util. Comm'n, Mar. 4, 1975); *United Video, Inc.,* Cause No. 24892 (Okla. Corp. Comm'n, Nov. 14, 1974), 13 P.U.R. 4th 457 (Okla. Corp. Comm'n 1976). Thus, federal and state regulation combine to establish control over entry by common carriers into both the interstate and the intrastate aspects of the business of providing telecommunications service.

A similarly pervasive regulatory scheme governs the entry of suppliers seeking to provide the equipment used in telecommunications common carrier services. For many years, the regulatory jurisdiction over such entry was also split between the FCC and state regulatory agencies along interstate/intrastate lines, with the FCC regulating, under Sections 201-205 of the Communications Act, the kind of equipment that could be interconnected to the network where only interstate services were involved, and state regulatory agencies regulating such interconnections where local or intrastate service was involved under comparable state statutes.[43] More recently, however, the FCC has asserted paramount jurisdiction over the interconnection of all equipment used at any time for interstate services and, by virtue of the integrated nature of the telecommunications network, has essentially superceded state regulatory jurisdiction in this area. *Telerent Leasing Corp.,* 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utilities Commission* v. *FCC,* 537 F.2d 788 (4th Cir. 1976), *cert. denied,* —— U.S. —— (December 13, 1976). Although there is still a dispute as to the correctness of this decision—and, indeed, the issue is still pending in a related case in the Court of Appeals for the Fourth Circuit (see *supra,* note 3)—the outcome of this dispute is irrelevant for present purposes. For however this jurisdictional dispute between the FCC and the state regulatory agencies is resolved, it is abundantly clear that control over the terms and conditions of such entry rests ultimately with one or the other of these regulatory authorities and *not with the carriers.*

The FCC and state regulatory agencies thus have plenary power over entry into, and, indeed, over the composition at any point in time of, the industry that provides common carrier telecommunications services to the public, including the equipment used in providing such services. They can preclude entry by new carriers or equipment suppliers, or they can per-

[43] For typical examples of such state regulation under entirely comparable statutory schemes, see *Slavin* v. *Southwestern Bell Tel. Co.,* 8 P.U.R. 4th 624 (Mo. Pub. Serv. Comm'n 1975); *Pacific Tel. & Tel. Co.,* Docket No. 9625 (Cal. Pub. Util. Comm'n, Apr. 22, 1975); *Rochester Tel. Co.,* 94 P.U.R.3d 370 (N.Y. Pub. Serv. Comm'n 1972); *Peters Sunset Beach, Inc.* v. *Northwestern Bell Tel. Co.,* 60 P.U.R.3d 363 (Minn. R.R. & Warehouse Comm'n 1965), *aff'd,* 70 P.U.R.3d 97 (Minn. Dist. Ct. 1966).

mit such entry. Thus, these agencies can bring about an industry structure consisting of many participants, or only a few, depending upon their view of the public interest.[44]

The Commission's power over prices is fully as pervasive as its power over entry. The most pertinent provisions with respect to interstate rates are those set out in Sections 203-205 of the Communications Act:

> *Section 203.*
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> "(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication . . .
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> * * *
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> "(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder . . ."
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> * * *

[44] The principal limitation upon the power of the regulatory agencies to structure the industry that provides telecommunications common carrier services is the congressional determination embodied in the Communications Act that the FCC should not permit new entry solely for the purpose of increasing competition. *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953). The existence of this limitation upon the FCC in no way confers power over entry upon the carriers and certainly does not support the idea that Congress intended that the antitrust laws should apply to telecommunications common carrier activities.

> *Section 204.*
>
> "(a) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof . . ."
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> * * *
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> *Section 205.*
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> "(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge. . . ."

Again, the FCC's plenary power over the Bell System's interstate rates is matched by the state regulatory agencies' comparable powers with respect to the Bell System's local and intrastate rates.[45] By virtue of this pervasive regulatory framework, neither the Bell System nor any other telecommunications common carrier enterprise has or can acquire ultimate control over even its own prices, let alone the prices charged by others.

The regulatory scheme established by the Communications Act and comparable state statutes thus pre-

[45] See, *e.g.*, *New England Tel. & Tel. Co.*, 6 P.U.R. Digest 2d (1976-1977 Supp.) 21 (R.I. Pub. Util. Comm'n 1974); *Board of Supervisors* v. *Chesapeake & Potomac Tel. Co. of Va.*, 212 Va. 57, 182 S.E.2d 30 (1971).

cludes, as a matter of law, the Government's basic charges of monopolization. Under that scheme, no common carrier enterprise, however large it may be, can establish control over entry or prices with respect to the provision of telecommunications common carrier service and, hence, no carrier can monopolize (or attempt or conspire to monopolize) the provision of such service.

The same inconsistency between pervasive common carrier regulation and the antitrust laws is present with respect to each of the five groups of specific charges which the Government has identified as providing the grounds for its basic monopolization charges. In the interest of brevity, petitioners will analyze these charges principally in terms of the provisions of the Communications Act, since state statutes are fully comparable.

The Government's specific charges with respect to the rates, interconnection provisions, terms and conditions of service and other practices set forth in the Bell System's common carrier tariffs include charges that the Bell System's tariffed rates for competitive services have been too low, that tariff provisions dealing with the use of customer-provided equipment have been unduly restrictive, that tariff restrictions on interconnection with other carriers and on the resale of service have been unreasonable, and other similar charges. As is apparent from the discussion above, all of these charges unquestionably relate to matters that are pervasively regulated, both by the FCC and by the state regulatory agencies.

Under the Communications Act, no common carrier facility can be constructed or operated unless and until

a certificate of public convenience and necessity has been obtained from the FCC and a tariff has been filed with the Commission fully describing the service to be provided and all applicable charges, terms, and conditions of that service (47 U.S.C. §§ 214(a), 203). The FCC has power to investigate such tariffs and, during such investigation, to suspend or condition their effectiveness (47 U.S.C. § 204). The Commission can then either approve or disapprove the tariffs or, alternatively, it can prescribe and enforce whatever rates, terms, and conditions of service it finds to be in the public interest (47 U.S.C. § 201). Only after a tariff has become effective can a carrier provide the service described in that tariff (47 U.S.C. § 203(c)) and once that tariff has become effective, the carrier is required by law, subject to heavy penalties, to provide such service only in strict accordance with the terms of the tariff (47 U.S.C. § 203(c)). See *Ambassador, Inc.* v. *United States*, 325 U.S. 317, 323 (1945). In no event may a carrier discontinue any service provided for in the tariff without the approval of the Commission (47 U.S.C. §§ 203(b), 214(a)). Similar provisions of state law control the Bell System's offering of local and intrastate common carrier telecommunications services.[46]

The tariffing process established by the Communications Act applies both to the pricing and the interconnection activities charged by the Government in its complaint. As shown, the Commission and the state regulatory agencies have plenary power over rates. The regulatory agencies have the power to prescribe

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[46] See, *e.g.*, Colo. Rev. Stat. §§ 40-3-102 to 40-3-104, 40-3-111, 40-5-101; Fla. Stat. Ann. §§ 364.04, 364.05, 364.08, 364.13, 364.14 (West); Ill. Rev. Stat. ch. 111⅔, §§ 33, 35, 36, 37, 49a; N.Y. Pub. Serv. Law §§ 92, 96, 99 (McKinney).

such rates, to protect the public against discrimination as among various rates, and to control, as part of their ratemaking function, the overall rate of return of the common carrier enterprise (see, *e.g.,* 47 U.S.C. §§ 205, 202, 201). In the effectuation of this ratemaking authority, these agencies have the power to value the properties of the carriers, to allow or disallow any expense incurred by the carriers, and to control the entire accounting system maintained by the carriers so as to assure themselves of complete information, not only with respect to the particular rates involved but with respect to the overall operations of the carriers (see, *e.g.,* 47 U.S.C. §§ 213, 201, 220).

Regulatory powers over the provisions of Bell System tariffs relating to interconnection are equally broad. Telecommunications common carriers are required to establish interconnections with other carriers, to establish through routes and charges and just and reasonable divisions thereof, and to provide adequate facilities for operating such through routes whenever such action is found necessary or desirable in the public interest (see, *e.g.,* 47 U.S.C. § 201). The interconnection practices applicable to a particular common carrier service are an integral part of that service and generally are set forth in tariffs filed in accordance with the tariffing process described above (see, *e.g.,* 47 U.S.C. § 203(a)). Hence, the regulatory power over interconnection is equally as broad, and regulatory jurisdiction equally as pervasive, as regulatory power and jurisdiction over the rates of common carriers for telecommunications services.

The FCC and state regulatory agencies also have effective regulatory authority over the second group of charges identified by the Government as involved in

this case—that is, the practices of common carriers connected with the furnishing of telecommunications services, whether or not included in the carriers' tariffs themselves (47 U.S.C. § 201(b)). These charges include the charge that the Bell System improperly preannounced the availability of certain services it intended to offer in competition with others, the charge that it engaged in a crash program to implement microwave technology into its system, and several other charges of like character. Under the Communications Act, it is clear that the Commission can, either upon complaint or on its own motion, investigate any Bell System practice in connection with the provision of common carrier service (47 U.S.C. §§ 201(b), 202(a), 208, 403) and, as a part of its rate-making authority, the Commission has authority effectively to control or prevent anticompetitive conduct, whether or not that practice is a part of the actual tariff that describes that service (47 U.S.C. §§ 201(b), 154(i), 403). Similar provisions appear in state regulatory statutes,[47] thus assur-

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[47] Several state regulatory agencies have exercised their statutory authority over telecommunications common carriers to investigate and control the very kinds of practices alleged by the Government in this case. See, *e.g., Rayne Communications* v. *Pacific Tel. & Tel. Co.,* Case No. 9732 (Cal. Pub. Util. Comm'n, Apr. 8, 1975), and *Sound, Inc.* v. *Northwestern Bell Tel. Co.,* Case No. 3-250 (Iowa Commerce Comm'n, filed Oct. 1, 1973) (concerning allegations of the premature marketing of equipment); *Universal Communication Systems* v. *Southern New England Tel. Co.,* Docket No. 10969 (Conn. Pub. Util. Comm'n, May 5, 1971), and *New York Tel. Co.,* 44 P.U.R. (n.s.) 265 (N.Y. Pub. Serv. Comm'n 1942) (concerning complaints with respect to the sale or leasing of inside wiring); and *General Tel. Co. of the Southeast,* 13 P.U.R.4th 24 (S.C. Pub. Serv. Comm'n 1976), *Southern Bell Tel. & Tel. Co.,* 12 P.U.R.4th 252 (Fla. Pub. Serv. Comm'n 1975), and *Northwestern Bell Tel. Co.,* 8 P.U.R.4th 75 (Minn. Pub. Serv. Comm'n 1974) (concerning expenditures for advertising).

ing that these kinds of practices, to the extent that they have actually occurred, can be reviewed by regulatory agencies.

With respect to the third group of matters identified by the Government—the policies and practices followed by the Bell System in procuring equipment and facilities to be used to provide common carrier services—again both the FCC and the state regulatory agencies comprehensively regulate such matters. The Communications Act places a direct responsibility upon the carriers to acquire and maintain the facilities and equipment necessary to provide "communication service upon reasonable request therefor" (47 U.S.C. § 201(a)) and empowers the Commission to order carriers to obtain and provide facilities it finds reasonably to be required in the public interest for the efficient provision of such services (47 U.S.C. § 214(d)). To meet this responsibility, the Bell System manufactures a large part of the necessary facilities through its own manufacturing arm, Western Electric. The third group of the Government's charges grows largely out of this fact. These charges include charges that the Bell System causes Western Electric to manufacture most of its equipment needs, that it causes the Bell operating companies to buy most of their equipment from Western and that it refrains from buying suitable equipment from outside suppliers.

Again there are ample regulatory powers with respect to these matters. Thus, the Commission is empowered to deal with unjust, unreasonable or discriminatory practices with respect to the furnishing of equipment or facilities which affect communications service (see, *e.g.,* 47 U.S.C. § 201(b)). Moreover, as an integral part of their evaluation of the reasonable-

ness of the Bell System's rates and overall rate of return, the regulatory agencies exercise effective control over Western's role within the Bell System. Thus, in numerous rate cases, the FCC and state regulatory agencies have reviewed the reasonableness of the transfer charges entered in the accounts of other Bell System companies and departments with respect to equipment acquired from Western Electric, the reasonableness of the Bell System's make-or-buy decisions, policies and practices, the reasonableness of the Bell System's equipment procurement practices, including Bell's evaluation of non-Western Electric equipment for use by the Bell System, and the reasonableness of Western Electric's profits. See, *e.g., Smith* v. *Illinois Bell Telephone Co.,* 282 U.S. 133, 152-53 (1930); *AT&T, Charges for Domestic Telephone Service,* 27 F.C.C.2d 151, 156 (1971), and cases cited *supra,* note 16. Indeed, at this very time the FCC is completing an extensive investigation into all of these matters in a proceeding "which deals, among other things, with all ramifications of the relationship of Western Electric to the Bell System and its effect upon telephone rates and revenue requirements." *AT&T, Charges for Interstate Telephone Service,* 38 F.C.C.2d 213, 244 (1972).[48]

The Government's charges with respect to the positions taken by the Bell System in proceedings before regulatory agencies also relate to matters subject to

[48] The Communications Act further facilitates the Commission's regulation of Western Electric's practices and profits by including all controlled companies in the reporting requirements of the Act (47 U.S.C. § 219(a)) and by specifically authorizing the Commission to examine all transactions relating to the furnishing of equipment, supplies, research or services to any carrier, including all accounts, records and memoranda of persons furnishing such equipment, supplies, research or services (47 U.S.C. § 215(a)).

pervasive regulation. These charges involve such matters as the Bell System's opposition before the FCC to new entry into the provision of common carrier services and to the allocation of frequencies to private microwave operators. The Communications Act expressly guarantees the right of any party to appear in an FCC proceeding and to present its views to the Commission (47 U.S.C. § 154(j)), but confers upon the Commission the power to designate the specific issues to be investigated and the procedures to be followed in every proceeding. Moreover, it is the Commission which ultimately determines in every case where the public interest lies and which executes and enforces the provisions of the Act (47 U.S.C. § 151). To assure the Commission's ability to determine what the public interest requires and to enforce its decisions, the FCC is given broad power to issue rules, regulations and orders necessary in the execution of its functions (47 U.S.C. § 154(i)). See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 181 (1968).

Finally, with respect to the Government's more generalized anticompetitive charges, the Commission has ample authority to deal with unfair or anticompetitive practices engaged in by a telecommunications common carrier in violation of any of the provisions of the Act. Either upon complaint or on its own motion, the Commission is authorized to investigate anything of this nature done or omitted to be done by any common carrier (47 U.S.C. §§ 208, 403). Thus, the Commission has frequently asserted that it will monitor the implementation of its policies and remedy any unfair or anticompetitive conduct by any carrier which is found to be inconsistent with the public interest. For example, in

COMSAT General Corp., 59 F.C.C.2d 344 (1976), the Commission stated emphatically (*id.* at 348):

> "... should the RCA Companies or another party present us with a concrete instance of a predatory practice by AT&T, we will not hesitate to take appropriate remedial action to preserve the competitive integrity of the domestic satellite service."

Indeed, the Court of Appeals for the District of Columbia Circuit held in *National Association of Regulatory Utility Commissioners* v. *FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 96 S. Ct. 2203 (1976), that the Commission has not only the authority but an affirmative duty under the Communications Act to regulate anticompetitive behavior by telecommunications common carriers (525 F.2d at 638):

> "The Commission retains a duty of continual supervision of the development of the system as a whole, and this includes being on the lookout for possible anticompetitive effects."

B. This Court Has Consistently Recognized That Activities Subject to Pervasive Regulation Cannot Be Attacked Under the Sherman Act.

Since both the Government's basic monopolization charges and the charges relied upon by the Government to support these basic charges are within the jurisdiction of regulatory agencies, the district court plainly ought to have recognized that this case is not within its antitrust jurisdiction. This Court has held, on at least three separate occasions, that the antitrust laws do not apply to activities subject to a pervasive scheme of regulation. *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409

U.S. 363 (1973); *United States* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694 (1975).

In *Pan American,* this Court ordered a government antitrust complaint dismissed because the allegations of that complaint related to matters basic to the comprehensive scheme which Congress established by enactment of the Federal Aviation Act, 72 Stat. 731, 49 U.S.C. § 1301 *et seq.,* for the regulation of airline common carriers. The Government had charged Pan American, an airline common carrier, W. R. Grace & Co., and Panagra, a second airline common carrier that was jointly owned by Pan American and Grace, with Sherman Act violations arising out of their alleged monopolization of air routes and territorial allocations. In *Pan American,* as here, the specific charges advanced by the Government related to the regulated activities of the airline common carriers. In these circumstances, the Court held that the antitrust laws could not be used as a justification for judicial intervention into matters basic to a pervasive scheme of common carrier regulation (371 U.S. at 305, 309):

> "Limitation of routes and division of territories and the relation of common carriers to air carriers are basic in this regulatory scheme. . . .
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> * * *
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> "It would be strange, indeed, if a division of territories or an allocation of routes which met the requirements of the 'public interest' as defined in § 2 were held to be antitrust violations. It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under § 408 should run afoul of the antitrust laws. Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review as provided in 49 U.S.C. § 1486."

In *Hughes,* this Court applied the same principle to a complaint brought by an airline common carrier charging that an aircraft manufacturer had used "its control over TWA to control and dictate the manner and method by which TWA acquired aircraft and the necessary financing thereof" (409 U.S. at 366). The *Hughes* case arose out of an acquisition by the Hughes Tool Company of a controlling interest in TWA, which acquisition was approved under the Federal Aviation Act resulting in an express antitrust immunity under Section 414 of that Act "insofar as may be necessary to enable . . . [Hughes and TWA] to do anything authorized, approved, or required by such order" (49 U.S.C. § 1384). However, the action brought by TWA against Hughes did not involve any aspect of the acquisition transaction itself, but wholly independent conduct of Hughes following the acquisition. This Court held, nonetheless, that the activities complained of were not subject to the jurisdiction of an antitrust court because TWA "is subject to pervasive control by the CAB . . . and the ongoing supervision entrusted to the CAB by Section 415 is broad enough to put all transactions between parent and subsidiary —as originally conceived or subsequently exercised— under CAB supervision" (409 U.S. at 387-88).

Finally, in the *NASD* case, the Court again stated and applied the principle that the antitrust laws have no application to matters subject to a pervasive scheme of regulation. The *NASD* case involved an action brought by the Government against securities dealers regulated under the Maloney Act, 52 Stat. 1070,

15 U.S.C. § 78o-3, and the Investment Company Act of 1940, 54 Stat. 789, 15 U.S.C. § 80a-1 *et seq.* The Court dismissed the Government's complaint on the ground that the antitrust charges involved were inconsistent with the pervasive regulatory scheme established by those statutes.

The *NASD* decision is particularly significant here because Count I of the Government's complaint in that case alleged a broad conspiracy in violation of the Sherman Act including allegations of anticompetitive conduct not directly covered by the provisions of either of the regulatory statutes involved. In holding that the regulatory scheme involved was nonetheless "sufficiently pervasive" to preclude application of the antitrust laws to such conduct, the Court announced a principle which petitioners submit is directly applicable to this case (422 U.S. at 734-35):

> "To the extent that any of appellees' ancillary activities frustrate the SEC's regulatory objectives it has ample authority to eliminate them.
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> * * *
>
> "We therefore hold that with respect to the activities challenged in Count I of the complaint, the Sherman Act has been displaced by the pervasive regulatory scheme established by the Maloney and Investment Company Acts."

The holdings of this Court in *Pan American, Hughes,* and *NASD* are not isolated decisions based upon the peculiar facts of those cases. Quite the contrary, this Court has regularly reiterated the principle that the antitrust laws do not apply to activities subject to pervasive regulation, even in cases not involving such regulation. Ironically, two such cases—*Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973), and *United States* v. *Radio Corp. of America,* 358 U.S. 334 (1959)—are the very cases principally relied upon by the district court to justify its contrary decision here. The district court's reliance upon *Otter Tail Power* and *Radio Corporation of America* is demonstrably incorrect. Indeed, in each of those cases, the Court upheld antitrust jurisdiction over an antitrust complaint because—and only because—the regulatory statute involved did *not* subject the defendants to pervasive common carrier regulation with respect to the matters alleged in that complaint.

The decision in *Otter Tail Power* is unmistakable on this point. That case involved an antitrust complaint charging monopolization of and attempt to monopolize the retail distribution of electric power by refusals to sell power at wholesale to proposed municipal systems, by refusals to "wheel" power to such systems, and by other conduct allegedly designed to discourage municipalities from taking over the distribution of electric power within their boundaries (410 U.S. at 368). In holding that the antitrust laws could properly be applied to such activities in the interstate electric power transmission field, this Court specifically pointed out that Congress had considered and rejected the suggestion that the interstate transmission of electric power should be subject to pervasive common carrier regulation (410 U.S. at 373-74):

> "There is nothing in the legislative history which reveals a purpose to insulate electric power companies from the operation of the antitrust laws. To the contrary, the history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent

possible consistent with the public interest. As originally conceived, Part II would have included a 'common carrier' provision making it 'the duty of every public utility to . . . transmit energy for any person upon reasonable request. . . .' In addition, it would have empowered the Federal Power Commission to order wheeling if it found such action to be 'necessary or desirable in the public interest.' HR 5423, 74th Cong. 1st Sess.; S. 1725, 74th Cong., 1st Sess. These provisions were eliminated to preserve 'the voluntary action of the utilities.' S. Rep. No. 621, 74th Cong., 1st Sess., 19.

"It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships."

The plain implication of the majority opinion in *Otter Tail Power* thus is that the antitrust laws would *not* have been applicable to the activities involved in that case had Congress chosen to impose pervasive common carrier regulation upon the interstate transmission of electric power.[49]

The *Radio Corporation of America* case is also unequivocal in its recognition of the principle that the antitrust laws do not apply to activities subject to pervasive common carrier regulation. That case involved

[49] It is noteworthy that even without such pervasive common carrier regulation, three of the seven participating members of the Court regarded the regulatory scheme to be sufficiently comprehensive to require an implication of antitrust immunity with respect to the activities involved. The dissenters recognized that pervasive common carrier regulation was not involved (410 U.S. at 384-85, 390 n.7), but nonetheless would have found immunity from the antitrust laws for the activities charged since these activities took place "in a regime of rate regulation and licensed monopolies" (410 U.S. at 389).

an antitrust suit brought by the Government against companies in the broadcasting industry—an industry regulated under Title III of the Communications Act, which does not impose common carrier regulation, rather than Title II of that Act under which the Bell System and other telecommunications common carriers are regulated. In holding that the non-common carrier form of regulation established by Title III of the Communications Act does not preclude the application of the antitrust laws, this Court carefully pointed out the distinction between Title II and Title III regulation and held that difference to be "controlling" (358 U.S. at 348-49):

"While the television industry is also a regulated industry, it is regulated in a very different way [from pervasively regulated common carriers]. *That difference is controlling.* Radio broadcasters, including television broadcasters . . . are not included in the definition of common carriers in § 3(h) of the Communications Act, 47 U.S.C. § 153(h), as are telephone and telegraph companies. Thus, the extensive controls, including rate regulation, of Title II of the Communications Act, 47 U.S.C. §§ 201-222, do not apply. Television broadcasters remain free to set their own advertising rates. . . . Thus, there being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by federal courts [applying the antitrust laws] can work no mischief." (Emphasis supplied.).[50]

[50] During the course of its opinion (358 U.S. at 349), the Court in *Radio Corporation of America* quoted extensively from its previous opinion in *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940), in which it observed (309 U.S. at 474):

"In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to

Again, the plain implication of the Court's decision in *Radio Corporation of America* was that had Congress subjected broadcasters to pervasive common carrier regulation, the antitrust laws would not have been applicable.

Thus, contrary to the implication of the district court, *Otter Tail Power* and *Radio Corporation of America* implicitly hold that common carriers are not subject to the antitrust laws with respect to activities within a pervasive scheme of regulation. Other decisions of this Court are to the same effect.[51] Taken together with the explicit holdings of this Court in *Pan American, Hughes* and *NASD,* these cases unquestionably establish the broad applicability of this principle

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the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus, the Act recognizes that the field of broadcasting is one of free competition. *The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads. . . .*" (Emphasis supplied.)

[51] In *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 352 (1963), for example, this Court rejected a claim of antitrust immunity for the banking industry on precisely the reasoning of *Otter Tail Power* and *Radio Corporation of America:*

> "[B]ank regulation is in most respects *less complete than public utility regulation,* to which interstate rail and air carriers, among others, are subject. Rate regulation in the banking industry is limited and largely indirect . . . ; banks are under no duty not to discriminate in their services; and though the location of bank offices is regulated, banks may do business—place loans and solicit deposits—where they please."

See also, *California* v. *FPC,* 369 U.S. 482, 485 (1962), in which this Court found that the Natural Gas Act does not create a "pervasive regulatory scheme" with respect to the interstate transmission of natural gas.

and demonstrate the error of the district court's decision.

The applicability of this principle to the present case is in no way undermined by the fact that some of the common carrier activities of the Bell System against which the complaint in this case is directed are subject to regulation by state, rather than federal, regulatory agencies. Under the Communications Act, state regulation stands on the same footing as federal regulation insofar as the inapplicability of the antitrust laws to pervasively regulated matters is concerned because state regulation, which generally establishes the same kind of pervasive scheme as Title II of the Communications Act, is a part of the *federal* policy established by that Act.

At the time of the enactment of the Communications Act, many states had already developed comprehensive schemes for regulating the intrastate aspects of telecommunications common carrier service (see *infra,* p. 77). However, when Congress enacted the Communications Act, it unquestionably had—and recognized itself to have—the power to regulate anything substantially affecting interstate commerce, including all aspects of the communications industry, whether interstate, intrastate, or local. Nonetheless, Congress chose not to preempt the entire field with respect to common carrier telecommunications services but, instead, established a comprehensive regulatory scheme that preserved state regulation, and state regulatory agencies, as an appropriate means for the implementation of its overall federal policy. This is evident from the provisions of the Communications Act itself. See 47 U.S.C. §§ 152(b)(1), 153(e)(3), 221(b) and 410(a).

In the few instances where the FCC is excluded from jurisdiction over interstate services, Congress made it clear that this exclusion was dependent upon the existence of state regulation. See 47 U.S.C. §§ 153(e)(3) and 221(b).

Thus, the policy and provisions of the Communications Act itself make state regulation an integral part of federal policy. In such circumstances, the applicability of the antitrust laws to pervasively regulated activities must be tested by the same standards, whether such regulation is directly the responsibility of state or federal agencies, for the intention of Congress with respect to the applicability of the antitrust laws surely must have been the same for both. Antitrust immunity is therefore as necessary with respect to common carrier activities pervasively regulated by state agencies as it is with respect to activities regulated by federal agencies, if the intent of Congress is to be faithfully effectuated.

Moreover, and independently of the intent of Congress in enacting the Communications Act, pervasive regulation by state agencies of the Bell System's common carrier activities immunizes those activities from the federal antitrust laws under the doctrine of *Parker* v. *Brown,* 317 U.S. 341 (1943)—a doctrine which this Court has recently recognized to preclude the applicability of the federal antitrust laws to matters subject to pervasive public utility-type regulation by the States. Thus, although upholding the applicability of the antitrust laws to the alleged practice of a regulated utility of tying the sale of light bulbs to the provision of electric power service in *Cantor* v. *Detroit Edison Co.,* 96 S. Ct. 3110 (1976), the Court made it plain that its decision rested upon the fact that the activities in-

volved were not sufficiently central to the "distribution of electricity"—a function which the Court expressly recognized to be "pervasively regulated by the Michigan Public Service Commission" (96 S. Ct. at 3114). Because it regarded the action of Detroit Edison as essentially voluntary and clearly *outside* its pervasively regulated public utility function, the Court was able to conclude that the normal consequences of pervasive public utility regulation did not apply (96 S. Ct. 3120 n.37).

However, the plain implication of *Cantor,* like that of *Otter Tail Power* and *Radio Corporation of America,* is that had the activities involved been an integral part of a pervasively regulated public utility function, the antitrust laws would not have been applicable. Indeed, in *Cantor,* the Court assumed that the test of antitrust immunity based upon state public utility regulation was identical to that applicable where federal regulation is involved (96 S. Ct. at 3120). This is precisely the position of these petitioners with respect to the effect of pervasive state common carrier regulation and one that clearly establishes the inapplicability of the antitrust laws to all of the activities involved in this case.

C. The Principle That the Antitrust Laws Do Not Apply to Pervasively Regulated Common Carrier Activities Is A *Fortiori* Applicable to Telecommunications Common Carriers.

As pointed out in the discussion of the *Radio Corporation of America* case above, this Court has already strongly indicated that the principle applied in *Pan American, Hughes* and *NASD* is fully applicable to the pervasively regulated activities of telecommunications common carriers. However, because this precise question has not previously been directly decided by this

Court, there is no square holding of the Court on the point. Accordingly, petitioners will show that this principle is applicable—indeed, *a fortiori* applicable—to telecommunications common carriers because: (i) Title II of the Communications Act and comparable state regulatory statutes establish the most pervasive scheme of federal regulation applicable to any industry in this country; (ii) the background and legislative history of the Communications Act show more clearly than with respect to any other industry that has come before this Court the intention of Congress that the antitrust laws should not apply to activities pervasively regulated thereunder; and (iii) the Communications Act, as much as or more than any other federal regulatory statute, requires immunity from antitrust liability with respect to pervasively regulated activities in order to assure its workability.

(i) The scheme of regulation of telecommunications common carrier activities is the most pervasive regulatory scheme ever established by Congress.

The district court failed to recognize the consequences of the pervasive regulatory scheme that exists with respect to common carrier activities under Title II of the Communications Act and comparable state statutes. The court did not analyze these statutes or in any way measure their provisions against the charges made by the Government. Nor did it adequately discuss the decisions of this Court with respect to the immunity of pervasively regulated activities from antitrust liability. Indeed, the only reference in the district court's opinion to the principle that the antitrust laws do not apply to activities subject to a pervasive regulatory scheme is an oblique reference to the decision of this Court in *NASD* (App. A, p. 7a):

"It is true that a regulatory scheme may be so pervasive that it must displace the antitrust laws in particular and discrete instances. *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694, 735 (1975)."

The apparent implication of this reference is that the regulatory scheme to which the telecommunications common carrier activities of the Bell System involved in this suit are subject is somehow *less* pervasive than the regulatory scheme involved in the *NASD* case.

This suggestion simply highlights the district court's misapprehension of the nature of the regulatory scheme imposed upon telecommunications common carriers and the significance of that scheme under this Court's decisions establishing antitrust immunity for pervasively regulated activities. The regulatory scheme applicable to telecommunications common carriers under the Communications Act is far more pervasive than the scheme established by the Investment Company Act and the Maloney Act that was involved in the *NASD* case. Those statutes establish a pattern of self-regulation for the mutual fund industry, subject only to general supervision by the SEC and without any of the attributes of pervasive common carrier regulation, such as control over prices, rates of return, entry and so on that are the heart of the regulatory scheme applicable to telecommunications common carriers. By no conceivable test can a scheme of self-regulation such as that involved in *NASD* constitute a more pervasive regulatory scheme than the public utility-type regulation applied to telecommunications common carriers.[52]

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[52] Congress itself has recognized this fact. See Report of Special Study of Securities Markets of the SEC, H.R. Doc. No. 95, pt.

Quite the contrary, the plain fact is that the regulatory scheme which governs the activities of telecommunications common carriers is far more pervasive than the regulatory scheme involved in *NASD* and, indeed, more pervasive than that applicable to the activities of regulated companies in any other industry.[53]

As noted above, the relatively less stringent character of the regulatory schemes established for the electric power transmission, broadcasting, banking, and natural gas transmission industries has already been recognized by this Court (see cases discussed *supra*, pp. 56-60). In those decisions, the Court recognized that common carrier regulation stands apart from noncarrier regulation, which the Court expressly characterized as less than pervasive, precisely because noncarrier regulation lacks the stringent controls characteristic of common carrier regulation. Moreover, even within the group of industries subject to common carrier regulation, telecommunications common carriers stand apart as the single most pervasively regulated group.

Although both the Communications Act and the Federal Aviation Act contain provisions setting forth the

4, 88th Cong., 1st Sess., 501-504, 604-607 (1963), in which it was observed with respect to the Maloney Act that (*id.* at 606):

> "It was thought that this kind of self-regulation was far preferable to *detailed and pervasive regulation* by the Government which might be overly burdensome to business and Government alike." (Emphasis supplied.)

[53] This fact has essentially been recognized in lower court decisions. In *Carter* v. *American Tel. & Tel. Co.*, 365 F.2d 486, 495 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967), for example, Judge Brown aptly described Title II of the Communications Act as an "intricate statutory structure in which scarcely a single business act is free from continuous regulation or at least administrative governmental review."

basic elements of common carrier regulation, the Communications Act subjects all aspects of telecommunications services to regulation, including facilities used to provide such services (47 U.S.C. §§ 151, 201, 202, 214), whereas the CAB is expressly precluded from regulating the "schedules, equipment, accommodations, and facilities" used by air carriers (49 U.S.C. § 1371(e)(4)). Moreover, the FCC has substantially greater remedial powers than the CAB. For example, the FCC, unlike the CAB, can permit a tariff to go into effect subject to a duty to refund any portion of the charges subsequently found to have been unjustified (47 U.S.C. § 204), and, again unlike the CAB, the FCC has the power to award damages to any person injured by common carrier conduct found to be in violation of the Act (47 U.S.C. §§ 206-209).

Telecommunications common carriers are also more pervasively regulated than are the common carriers subject to the Shipping Act of 1916 or to the Interstate Commerce Act. The Shipping Act, for example, does not empower the Federal Maritime Commission to prescribe rates or compel service.[54] Moreover, with respect to conference agreements, the Shipping Act merely establishes a scheme of self-regulation policed by the shipping conferences under the general supervision of the FMC—a scheme comparable to the self-regulation found in the securities industries[55]—

[54] *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 490-91 (1958) ("No power to fix rates is granted to the Board."). See also *American Export-Isbrandtsen Lines, Inc.* v. *FMC*, 417 F.2d 749 (D.C. Cir. 1969); Testimony of FMC Chairman Harllee, *Hearing on Refunding of Freight Charges Before the Subcomm. on Merchant Marine and Fisheries of the Senate Commerce Comm.*, 90th Cong., 1st Sess., per. no. 90-56 (1967).

[55] See *Pacific Coast European Conf.* v. *FMC*, 439 F.2d 514, 516-17

and antitrust immunity for such conference agreements is expressly limited to agreements found to be lawful under the Shipping Act (46 U.S.C. § 814).[56] The regulation of railroad common carriers under Part I of the Interstate Commerce Act—the statute under which the interstate services of telecommunications common carriers were regulated prior to 1934 and upon which Title II of the Communications Act was modeled —is in many ways comparable to the regulation of telecommunications common carriers. Even the regulation of railroads, however, is less pervasive than that applicable to telecommunications common carriers in several important respects.[57] For example, the ICC

(D.C. Cir. 1970), *cert. dismissed,* 401 U.S. 967 (1971); *States Marine Lines, Inc.* v. *FMC,* 376 F.2d 230 (D.C. Cir. 1967).

[56] See *Carnation* v. *Pacific Westbound Conf.,* 383 U.S. 213 (1966), holding that the implementation of a conference rate-making agreement which had never been filed with or approved by the FMC, and which thus was "clearly unlawful under the Shipping Act" (*id.* at 221), was not exempt from the antitrust laws. But see *United States Navigation Co.* v. *Cunard Steamship Co.,* 284 U.S. 474 (1932), and *Far East Conf.* v. *United States,* 342 U.S. 570 (1952), holding that the courts cannot apply the antitrust laws to activities by shipping conferences of debatable legality under the Shipping Act because the application of the antitrust laws to such conduct might create a conflict between the courts and the FMC.

[57] Although less pervasive than the regulation of telecommunications common carriers under the Communications Act, the regulation of railroads has frequently been used by this Court as an example of a regulatory scheme which is sufficiently pervasive impliedly to repeal the antitrust laws. See, *e.g., United States* v. *Philadelphia National Bank,* 374 U.S. 321, 352 (1963); *United States* v. *Radio Corp. of America,* 358 U.S. 334, 348 (1959). Cases in which this Court has found antitrust immunity with respect to the regulated common carrier activities of railroads include *Terminal Warehouse Co.* v. *Pennsylvania R.R. Co.,* 297 U.S. 500 (1936), and *Keogh* v. *Chicago & Northwestern Ry. Co.,* 260 U.S. 156 (1922). Most of the cases applying the antitrust laws to rail-

does not regulate the prices and rates of return of suppliers of railroad equipment as the FCC, through its ratemaking authority, regulates the prices and profits of Western Electric and other integrated manufacturers of telecommunications equipment. Nor does the ICC have powers as broad as those conferred upon the FCC to coordinate service between common carriers to assure that the nationwide telecommunications network can be optimized to single system efficiency.[58]

roads, on the other hand, were decided prior to the Transportation Act of 1920 (41 Stat. 456) which dramatically shifted the focus of railroad regulation from the mere prevention of abuses of competition like unjustly discriminatory rates or rebates to a policy of comprehensive regulation aimed at the development and maintenance of adequate transportation services. See, *e.g., FCC* v. *RCA Communications, Inc.,* 346 U.S. 86, 92 (1953), contrasting the Transportation Act of 1920 with the two principal pre-1920 antitrust cases involving railroads, *United States* v. *Trans-Missouri Freight Ass'n,* 166 U.S. 290 (1897), and *United States* v. *Joint Freight Traffic Ass'n,* 171 U.S. 505 (1898). The only post-1920 case finding the antitrust laws in any way applicable to railroads was *Georgia* v. *Pennsylvania R.R. Co.,* 324 U.S. 439 (1945), holding that a combination and conspiracy among railroads based on their participation in a rate bureau was subject to the antitrust laws because Congress had on at least two occasions expressly declined to give the ICC jurisdiction over railroad rate bureaus (*id.* at 457). This gap in the regulation was closed in 1948 with the passage of the Reed-Bulwinkle Act (62 Stat. 472), which gave the ICC the authority to regulate rate bureaus and thus changed the result in *Georgia* v. *Pennsylvania R.R. Co.* See *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296, 306 n.11 (1963).

[58] For example, the Communications Act contains no counterpart to Section 15(4) of the Interstate Commerce Act which limits the power of the ICC to require a railroad to short-haul itself. The FCC has required telecommunications common carriers to establish interconnections notwithstanding the consequences of such interconnection upon the role of any particular carrier. See, *e.g., AT&T, Restrictions on Interconnection of Private Line Services,* 60 F.C.C.2d 939 (1976), discussed *supra* note 5.

The Department of Justice itself has repeatedly emphasized the unusually pervasive character of the kind of regulation to which telecommunications common carriers are subject and, on at least one occasion, has expressly characterized Title II of the Communications Act as establishing a pervasive regulatory scheme. In its brief as *amicus curiae* in *Gordon* v. *New York Stock Exchange, Inc.,* 422 U.S. 659 (1975), for example, the Department argued that antitrust immunity could not be implied in the securities industry because that industry is not subject to "comprehensive, public utility-like . . . regulation" (Brief for United States at 16, 35):

> "Far from imposing *public utility type regulation* on the exchanges, the [Securities Exchange] Act was designed to assure that securities exchanges operate under a regime of free enterprise . . . .
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> * * *
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> "The language, structure and history of the Act, as set forth above, show that Congress did not intend to substitute a *comprehensive, public utility-like system of government regulation* for the regime of competition . . . ." (Emphasis supplied.)

Similarly, in its brief as *amicus curiae* in *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289 (1973), the Department distinguished the self-regulation found in the commodities trading industry under the Commodity Exchange Act from industries regulated under "pervasive regulatory schemes" and, as an example of the latter, expressly referred to the regulation of telecommunication common carriers under Title II of the Communications Act (Brief for United States at 23 n.11).

In these circumstances, the error of the district court's decision in this case becomes starkly apparent.

The district court has held that the antitrust laws may be applied to activities of a common carrier enterprise regardless of how pervasively those activities are regulated. It has reached that decision in a case in which the charges made go to the very heart of the common carrier enterprise and include activities that are essential to the conduct of that enterprise and to the effectuation of the regulatory scheme. And the district court's decision has been made with respect to a complaint directed against the most pervasively regulated activities in the entire American economy. Such a decision not only ignores the controlling precedent of a consistent line of this Court's decisions but would, in effect, nullify the very principle upon which those decisions are based.

(ii) The background and legislative history of the Communications Act show plainly that Congress intended to displace the concept of competition embodied in the antitrust laws with a scheme of pervasive regulation applicable to common carrier activities.

There is a fundamental difference between the philosophy underlying the pervasive scheme of regulation applicable to telecommunications common carriers and that underlying the antitrust laws. The basic premise of pervasive common carrier regulation is a distrust of the capacity of free, unfettered competition to achieve economically and socially desirable results in particular industries. This distrust may be based on (1) the presence of overwhelming economies of scale which render competition—the basic force disciplining unregulated markets—unworkable; (2) the avoidance of wasteful duplication of facilities; (3) a sense that the service involved is socially too important to be entrusted to purely private decision-making; or, closely related to the last point, (4) a desire to have the service

provided more broadly or with more socially desirable attributes than a free market might provide it. Commonly all four motives are involved in the legislative decision to subject an industry to common carrier or other public utility-type regulation.[59]

Common carrier regulation has both negative and positive aspects. The negative aspect consists mainly in establishing a public veto over exploitative or short-sighted managerial decisions, such as charging rates that generate an unreasonably high return or expanding or contracting facilities unwarrantedly. This aspect of regulation reflects above all concern with the consequences of natural monopoly and with the need to limit private judgment in order to protect the larger public interest. The principal positive aspect of common carrier regulation is the age-old duty to serve.

[59] The common carrier concept has had a long history in Anglo-American law. Indeed, by the time the concept of competition came to be regarded in Anglo-American thought as the regulator of price, quality and the efficient allocation of resources (Adam Smith, Wealth of Nations (1776)), the concept of businesses "affected with a public interest" was firmly rooted in the common law (Lord Hale, *de Portibus Maris* (written prior to 1676, published in 1776), quoted in ***Munn*** v. ***Illinois***, 94 U.S. 113, 125, 126 (1876)). In its earliest forms the concept probably encompassed nothing more than an obligation to serve at reasonable rates without discrimination anyone who requested service of the kind offered by the common carrier. As common carrier regulation has developed, however, the obligations of a common carrier have become much more extensive. Typically, the company upon which a common carrier obligation is placed now not only must serve without discrimination all who seek to avail themselves of the service it offers, but also must provide service to anyone within its geographic area of responsibility, even if the provision of such service requires an extension of its routes. And it must continue to provide such service unless and until it receives authority to abandon service from the responsible regulatory agency.

This duty implies not merely a concern with arbitrary refusals to serve but, more importantly, a desire to have the regulated service provided more broadly, whether geographically or in terms of customer classes, than a free market would provide. This duty to serve is generally imposed because common carrier services are basic or necessary services; in economic terms, they provide the "infrastructure" of economic activity—the transportation and communications grids that must be in place as an essential precondition of economic development and social well-being.[60]

[60] Common carrier regulation in this country thus has been divorced from anything even resembling the concept of the competitive free market which the antitrust laws were designed to foster. The common carrier is not free to allocate its resources to the geographic areas, groups of persons or services that would produce the greatest rate of return on its investment, but, instead, is treated as a part of the economic infrastructure of the community with an obligation to provide services, whether remunerative or not, where the regulator decides that the availability of such services in particular areas or to particular groups of people is important to the overall well-being of the society. It is for that reason that common carriers and public utilities have traditionally been protected from competition. This approach is ancient in origin, having been commented upon as long ago as 1768 by Blackstone (3 W. Blackstone, Commentaries * 219):

> "If a ferry is erected on a river, so near another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness for the ease of all the king's subjects; otherwise he may be grievously amerced: it would be therefore extremely hard if a new ferry were suffered to share his profits, which does not also share his burthen."

In ***Panhandle Eastern Pipe Line Co.*** v. ***Michigan Public Service Commission***, 341 U.S. 329 (1951), this Court itself recognized and upheld the traditional approach to that problem (341 U.S. at 334):

> "Appellant asserts a right to compete for the cream of the volume business without regard to the local public convenience

In contrast with these recognized aims and purposes of pervasive common carrier regulation, "the sole aim of antitrust legislation is to protect competition." *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 689 (1975). The antitrust laws are premised on the assumption that a free market can be depended upon to provide all the products or services of a particular kind that are needed by the society, that competition will provide a stimulus to guarantee that the products or services available will be of the highest quality and offered at the lowest prices that the firm or the industry can achieve, and that if a firm, or even an entire industry, disappears as a result of competition, the larger public interest is automatically served because such disappearance must reflect the fact that society no longer needs the product or service involved. In competition theory, no product or service is essential, no group or area is entitled to any product or service for which it cannot pay, and references to the need for an economic "infrastructure" are dismissed as meaningless.

Quite plainly these two approaches to economic regulation are worlds apart. Yet under our system of laws, the decision has been made that both approaches have a place in the American economy. With respect to the general run of products and services in the economy, the policy of competition has been adopted and the antitrust laws were enacted to enforce that policy and to make certain that it will work. With respect to certain services, however, the responsible legislative authorities have decided that pervasive regulation must replace competition—that these services are simply too important to the society to be left to the uncontrolled operation of the free market. Thus, as Mr. Justice Frankfurter observed, speaking for the Court in *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 92 (1953):

> "It is only in a blunt, undiscriminating sense that we speak of competition as an ultimate good. . . .
>
> ". . . To do so would disregard not only those areas of economic activity so long committed to government monopoly as no longer to be thought open to competition, such as the post office, . . . and those areas, loosely spoken of as natural monopolies or—more broadly—public utilities, in which active regulation has been found necessary to compensate for the inability of competition to provide adequate regulation."

The essential premise of the decisions of this Court accommodating the antitrust laws to regulatory statutes is that the theory of competition cannot rationally be applied to products or services, the provision of which has been made subject to pervasive regulation.[61]

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or necessity. Were appellant successful in this venture, it would no doubt be reflected adversely in Consolidated's overall costs of service and its rates to customers whose only source of supply is Consolidated."

[61] There are at least three important considerations underlying this conclusion. First, the Court has recognized that companies subject to pervasive regulation with respect to the services they can offer, the prices they can charge, and the relationships they can maintain with other companies in the industry necessarily are curtailed from responding to market conditions with the flexibility demanded by competition. See, *e.g.*, *McLean Trucking Co. v. United States*, 321 U.S. 67, 84-85 (1944). Second, the Court has stated that regulation will not work in the manner Congress intended if antitrust courts applying the competition standard of the antitrust laws are permitted sporadically to intervene in the administration of a pervasive regulatory scheme. See, *e.g.*, *United States v. Radio Corp. of America*, 358 U.S. 334 (1959). Finally, the Court has held that it would be unfair to the regulated companies involved if they were

Title II of the Communications Act and comparable state regulation reflect legislative decisions that, with respect to the provision of telecommunications services, pervasive common carrier regulation, not competition, is the means by which the needs of society should be safeguarded and assured. Any conceivable doubt as to that fact is dispelled by the background and legislative history of the regulation of telecommunications common carriers.[62]

Following the expiration of the original Bell patents, the telecommunications industry experienced a period of competition in the provision of telecommunications services. In many instances two or more telephone companies provided local telephone service within a single community, and some of these companies also

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simultaneously subject to two inconsistent standards—the competition standard of the antitrust laws and the public interest standard of pervasive common carrier regulation. See *United States* v. *National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694 (1975). *Cf. Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975).

[62] In reaching the conclusion that the antitrust laws do not apply to the pervasively regulated activities of common carriers, the Court has recognized that it is engaged in a process of statutory construction. However, the Court has made it plain that this process is not limited to the construction of express immunity provisions, or to a search for an express indication of congressional intent to displace the antitrust laws. Quite the contrary, the Court has regularly referred to the presumed intention of Congress to avoid the imposition of duplicative and inconsistent standards that would render both competition and regulation unworkable and at the same time impose unfair burdens upon regulated companies. In the *NASD* case, for example, the Court observed (422 U.S. at 735):

> "In this instance, maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards. *This is hardly a result that Congress would have mandated.*" (Emphasis supplied.)

operated long distance facilities. However, competition in the provision of telephone services was found to be totally unsatisfactory, not only from the standpoint of the telephone companies involved but, more importantly, from the standpoint of the people in the communities in which such competition existed. Consequently, by 1910 nearly all of the States had adopted laws and policies to regulate telephone companies as public utilities and to discourage competition in the provision of telecommunications services.[63] Rates for telephone service were placed under strict regulatory control, and new entry into the industry was largely prohibited by regulatory agencies wherever adequate service was available from, or could be made available by, existing companies. Moreover, where competing telephone companies already existed, mergers were actively encouraged.[64]

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[63] In 1879, Connecticut and Missouri became the first States to regulate telephone companies as public utilities. (Conn. Laws, 1879, Ch. 36; Mo. Rev. Stat. 1879, Sec. 883). Between 1880 and 1887, ten additional States enacted similar statutes: Vermont (Laws 1880, No. 53), Ohio (Rev. Stat. 1880, Sec. 3471), New Hampshire (Laws 1881, Ch. 54, Sec. 11), Michigan (Laws 1883, p. 56), Arkansas (Laws 1885, p. 176), Indiana (Laws 1885, p. 151), Maine (Laws 1885, Ch. 378, Sec. 9), Massachusetts (Laws 1885, Ch. 267), Tennessee (Laws 1885, Ch. 10), and Virginia (Code, 1887, Sec. 1291). By 1900, twelve more States had passed such legislation. By 1910, there were only a few States without an enactment of this kind.

[64] This history of the substitution by the States of public utility regulation for competition was described by the Missouri Public Service Commission in *Johnson County Home Telephone Co.*, 8 Mo. P.S.C.R. 637, 643-44 (1919):

> "Competition between public service corporations was in vogue for many years as the proper method of securing the best results for the public from the corporations engaged in serving the public. The consensus of modern opinion, however, is that competition has failed to bring the result desired, con-

In 1910, as part of the Mann-Elkins Act (36 Stat. 539) amendment to the Interstate Commerce Act, telephone and telegraph companies were added to the definition of common carriers subject to rate regulation by the Interstate Commerce Commission. Thus, telecommunications common carriers were subject to regulation under the Commerce Act when, as a result of the Transportation Act of 1920, the Interstate Commerce Commission was first charged with an affirmative duty to develop and maintain adequate service in the public interest as opposed to merely preventing abuses of competition.[65]

The first federal legislation dealing specifically with the telecommunications industry was the Willis-Graham Act of 1921 (42 Stat. 27) which encouraged the further consolidation of telephone companies by creating an express exemption from the antitrust laws

> sidering the situation as a whole. Nearly all of the states in this country have adopted laws providing for the regulation of public service corporations as to rates and service by public officers. It is the purpose of such laws to require public service corporations to give adequate service at reasonable rates, rather than to depend upon competition to bring such results."

In that case the Missouri Commission approved the consolidation of two competing telephone companies on the ground "that the consolidation of the properties will bring about better services to the public" (*id.* at 644). See also *Perry County Tel. & Tel. Co.* v. *Public Serv. Comm'n*, 265 Pa. 274, 108 A. 659 (1919); *Re Central Union Telephone Co.*, P.U.R. 1920B, 813, 847 (Ind. Pub. Serv. Comm'n 1920); *Re Southern California Telephone Co.*, P.U.R. 1917A, 989, 1044-46 (Cal. R.R. Comm'n 1916).

[65] See *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 92 (1953); *New England Divisions Case*, 261 U.S. 184, 189 (1923); *Wisconsin R.R. Comm'n* v. *Chicago, B. & Q. R.R. Co.*, 257 U.S. 563, 585 (1922). See also 1 Sharfman, Interstate Commerce Commission 177-244 (1931).

for such acquisitions. The Willis-Graham Act terminated a commitment made by AT&T to the Attorney General in 1913 that no further acquisitions of independent competing telephone operating companies would be made by the Bell System.[66] The Act was based on a determination that duplication of telephone facilities "greatly increase[s] the burdens which must be borne by telephone users" and that "the best telephone service can be rendered by one company, under proper regulation as to rates and service" (H.R. Rep. No. 109, 67th Cong., 1st Sess. 1 (1921)). Thus, the Willis-Graham Act reflected a congressional determination that the public interest in telecommunications is best served by a single telephone network subject to regulation rather than by competition.[67]

The Willis-Graham Act and the provisions of the Transportation Act of 1920 relating to communications

[66] This commitment, commonly known as the "Kingsbury Commitment," was contained in a letter dated December 19, 1913, from Mr. N. C. Kingsbury, Vice President of AT&T, to Mr. J. C. McReynolds, Attorney General of the United States. See FCC, Report of the Investigation of the Telephone Industry in the United States, H.R. Doc. No. 340, 7th Cong., 1st Sess. 139-41 (1939).

[67] Representative Huddleston graphically described the need for consolidation and regulation of the telephone industry in the debates on the Willis-Graham Act (61 Cong. Rec. 1988 (1921)):

> "[T]here are monopolies which ought to exist in the interest of economy and good service in the public welfare, monopolies which must be promoted instead of being forbidden. The telephone business is one of these. Legitimate consolidation will promote economy. It will promote service. It is foolish to talk about competition in the transmission of intelligence by telephone. It is silly to believe that there can be real competition either in service or in charges . . . .
>
> "[T]he thing that the American Congress ought to do is to . . . regulate those monopolies so as to get reasonable prices and good service for the people . . . ."

common carriers accomplished their purpose within the next few years: competition in local exchange services was eliminated; each telephone operating company —whether Bell or independent—offered local exchange telephone service as a legally franchised monopoly within the geographical boundaries of its franchise; the Long Lines Department of AT&T provided the backbone of a network of intercity transmission and switching facilities connecting all of these local exchange service areas; and division of revenues and settlement agreements were worked out between the different telephone companies involved, subject to regulatory supervision, to compensate each company participating in the provision of service.

The technical integrity of this network was assured by agreements between the companies to conform to a uniform set of technical and maintenance standards which were developed and implemented under the leadership of AT&T. Changes in the design and capacity of the network to meet growing user demands were centrally planned by AT&T and implemented in a manner designed to optimize the operation of the network, eliminating the need for duplicative facilities by different companies and guaranteeing that service would be available to all subscribers at the lowest possible cost. Eventually, even the system by which telephone numbers were assigned to subscribers was brought under central control, with AT&T developing a numbering plan for the entire country designed to permit direct calling without operator assistance between any two subscribers in the country. Thus, all of the telephone companies in the country were brought into a single partnership designed, not to compete with one another but rather, to assure the American people the best tele-

phone service possible at reasonable rates over a single network planned, managed, and operated on a nationwide basis.

Having thus brought about the consolidation and coordination of a single nationwide telecommunications network, Congress then set out to evaluate the results of its policies. In 1932, as a part of a general investigation by Congress into the structure of American industry that had commenced several years earlier, a resolution of the House of Representatives directed an investigation of the corporate structure and organization of the telecommunications industry, the electric power industry and the gas industry (H.R. Res. No. 59, 72d Cong., 1st Sess. (1932)). Throughout the extensive investigation and hearings that followed, Congress carefully reexamined the structure of the telecommunications industry that had emerged from existing policies, including the local franchised monopolies of the Bell System operating companies, the interstate long distance monopoly of AT&T, the integration of Western Electric and Bell Labs and the nature of the Bell System interrelationships.[68] This investigation was conducted under the supervision of Dr. Walter M. W.

[68] Senator Dill (Chairman of the Senate Committee on Interstate Commerce) stated the general understanding upon which the investigation had been premised (78 Cong. Rec. 8824 (1934)):

> "I think it is generally well known by those who know anything about the set-up of the telephone monopoly, that under the present arrangement, the parent telephone company, the American Telephone & Telegraph, not only owns the operating companies in the principal cities in the United States . . . but it owns the manufacturing company, the Western Electric, which supplies the operating companies with the equipment of the telephone business, and there is no competitive bidding on the part of those who would sell equipment to the operating companies."

Splawn, Special Counsel to the House Committee on Interstate and Foreign Commerce, who also supervised the investigation into the electric power and gas industries. Dr. Splawn's report on the telecommunications industry recognized that the technology of that industry was essential to and justified a single nationwide integrated structure. In this connection, his report specifically pointed out that the "present . . . monopoly in telephone service for long distance . . . has been recognized as lawful in the present act to regulate interstate commerce." [69] The report concluded by recommending that the existing integrated structure of the industry be retained, and that it be still more comprehensively regulated as a common carrier industry by a new federal commission.[70]

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[69] Report on Communications Companies, H.R. Rep. No. 1273, 73d Cong., 2d Sess. pt. III, No. 1, at X (1934).

[70] In contrast, the second Splawn Report urged the immediate dismemberment of electric power and gas holding company structures. In supporting this recommendation before the Senate Commerce Committee and the House Committee on Interstate and Foreign Commerce, Dr. Splawn described the unique interrelationships required for useful telecommunications and explained the differences between the structure needed in the telecommunications industry and that appropriate for the electric power industry (*Hearings on S. 1725 Before the Senate Comm. on Interstate Commerce,* 74th Cong., 1st Sess. 75 (1935); *Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce,* 74th Cong., 1st Sess. 180 (1935)):

> "Someone seems to have had a dream that the electric power business could be organized corporately and conducted very much as the telephone business is. Now there's quite a difference in the physical operation of the two. The telephone, in order to be most useful must be connected through switchboards with every other switchboard in the entire country.
>
> * * *
>
> "The power business is not like the telephone business . . . ."

Congress accepted Dr. Splawn's recommendations. Congress concluded that the structure of the telecommunications industry should not be changed, but that all aspects of its operations should be pervasively regulated in the public interest.[71] Title II of the Communications Act of 1934 reflects this conclusion.

The whole plan of Title II of the Communications Act is inconsistent with the notion that Congress intended that reliance would be placed upon the competition standard of the antitrust laws to govern the provision of telecommunications service. The Act is based upon the common carrier concept that service should be available at reasonable rates to as many persons as reasonably possible and that the enterprises providing telecommunications services will be operated and managed to achieve this end. Moreover, the Act clearly contemplates that these common carriers will work together rather than competitively in the provision of such services. The Act's reference to "a rapid, efficient, Nation-wide, and world-wide wire and radio communications service," (47 U.S.C. § 151), in particular makes it plain that Congress envisioned a system optimized in accordance with modern engineering networking concepts in which each company participating in the provision of service would become an integral part of a coordinated nationwide network. The Act created a

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[71] In contrast, Congress reached a very different conclusion with respect to the electric power and gas industries—a determination that there should be extreme restructuring through divestiture by the holding companies of operating companies and manufacturing subsidiaries, with a prohibition of service contracts between operating and holding companies. These so-called "death sentence" provisions with respect to electric power and gas holding companies were enacted in the Public Utility Holding Company Act of 1935 (15 U.S.C. §§ 79b(29), 79h, 79m).

new commission—the Federal Communications Commission—to supervise, in cooperation with existing state regulatory agencies, the development and operation of this network.

In *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 93 (1953), this Court observed:

> "The very fact that Congress has seen fit to enter into the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in communications."

The background and legislative history of the Communications Act confirm this observation, as well as the Court's reliance in *RCA* upon its previous decision in *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940), in which it had been pointed out that by the enactment of Title II of the Communications Act, Congress "abandoned the principle of free competition" in the provision of common carrier telecommunications services and deliberately chose to place its trust in a system of pervasive regulation.

(iii) Application of the antitrust laws to the pervasively regulated activities of telecommunications common carriers is plainly repugnant to the regulatory scheme.

In view of the pervasive character of the scheme of regulation applicable to telecommunications common carriers and the clear intent of Congress in establishing that scheme, the district court could and should have dismissed this case without further inquiry. However, the court felt constrained on the basis of some language in this Court's prior decisions largely to ignore both the provisions of the Communications Act

and its background and legislative history [72] in favor of an inquiry into whether a "plain repugnancy" (App. A, p. 7a) or "irreconcilable conflict between the regulatory statute and the antitrust laws exists" (App. A, p. 6a).

In the context of this case, petitioners submit that this whole inquiry was unnecessary. A scheme of common carrier regulation enacted by Congress for the very purpose of substituting pervasive regulation for competition is by definition repugnant to and irreconcilable with the application of the antitrust laws to the very matters so regulated. In any event, however, the fact of repugnancy between pervasive common carrier regulation and the charges made by the Government in its complaint in this case can readily be demonstrated.

The Government's basic charges that petitioners have *monopolized* alleged markets in telecommunications services and equipment include charges that the Bell System progressively embraced telecommunica-

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[72] The only direct reference to any of these matters contained in the district court's entire opinion is its conclusion (App. A, p. 8a):

> "Neither the language, nor the legislative history of the Communications Act supports the conclusion that Congress intended by that Act to grant a total, blanket immunity to defendants from application of the antitrust laws . . . ."

Of course, petitioners have never contended for, and do not here contend for, "blanket immunity . . . from application of the antitrust laws." Petitioners' contention, as stated throughout this petition, as well as in the memoranda they submitted to the district court, is that they are immune from the antitrust laws with respect to their pervasively regulated activities as a common carrier enterprise and that the complaint in this case should be dismissed *because such activities constitute virtually all of the charges encompassed within that complaint* and the remaining charges are reasonably ancillary to those activities and, in any event, within the jurisdiction of the regulatory agencies (see *infra*, pp. 101-106). The failure of the district court to focus upon this essential point vitiates its entire opinion and particularly its treatment of the provisions, background and legislative history of the Communications Act.

tions service and equipment opportunities (App. F., p. 68a), that it preempted the private microwave field for some two decades after World War II (App. F., p. 65a), and that it substantially reduced rates so as virtually to eliminate the incentive for construction and use of private microwave systems (App. F., p. 66a). Indeed, it is these kinds of charges upon which the complaint in this case ultimately rests, for the Government's position is that petitioners must be held guilty of violating the antitrust laws "if they have willfully and deliberately acquired or maintained monopoly power, regardless of whether their deliberate means and methods were legal or illegal, or approved, disapproved, or not examined by the Federal Communications Commission or any other regulatory agency" (Government Memo. dated March 24, 1975, p. 29). Thus, the whole thrust of the charges in this case is that the Bell System has served, or at least "conspired" or attempted to serve, *too many people.*[73]

As shown in detail above, however, the very standard of regulation of telecommunications common carriers is designed to assure the availability of that essential service to *as many people as possible.* The express purpose of the Communications Act is "to make available, so far as possible, *to all the people of the United States,* a rapid, efficient, Nation-wide, and world-wide

[73] The Government's March 24, 1975 memorandum to the district court makes this fact clear, citing in support of the proposition quoted in the text the following authorities: *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 346 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954); *United States* v. *Aluminum Company of America,* 148 F.2d 416, 430-32 (2d Cir. 1945). The cited portions of each of these cases—*none of which involved a regulated industry, much less a pervasively regulated common carrier enterprise*—suggest that Section 2 of the Sherman Act may prohibit even lawful activities that are designed to acquire or maintain a predominant percentage of a market.

wire and radio communication service . . ." (47 U.S.C. § 151) (emphasis supplied). The FCC has recognized this essential purpose of telecommunications common carrier regulation and has held that a carrier would be "remiss in its duties as a licensee if it does not, in fact, undertake improvements in facilities and expansion of services to meet public demand." *RCA Communications, Inc.,* 8 P&F Radio Reg. 1227, 1233 (1956). See also *Diamond State Telephone Co.,* FCC 50-648 (slip op. at 4, May 23, 1950). State regulatory agencies have stated the same view with respect to the obligations of telecommunications common carriers. The Mississippi Public Service Commission, for example, stated in *Southern Bell Telephone & Telegraph Co.,* 34 P.U.R.3d 145, 148 (1960):

> "As a public utility, Southern Bell is *required* to provide adequate service to the people living within the areas of its service undertaking.
>
> "It is *under a duty* to establish, construct, maintain, and operate a system which is adequate to meet the needs of a community, both rural and urban, and to keep pace with the growth of the community served." (Emphasis supplied.)

See also *Re Nucla-Naturita Telephone Co.,* 33 P.U.R. 3d 278, 282 (Colo. Pub. Util. Comm'n 1960); *Re Murphy,* 26 P.U.R.2d 513, 517-19 (Mo. Pub. Serv. Comm'n 1958).

There is a plain repugnancy between a complaint charging that the Bell System has sought to serve too many people and the obligation imposed upon it by the Communications Act and state regulatory statutes as a general service carrier to provide service adequate to meet the needs of as many people as possible. The

Bell System plainly cannot meet its general service obligations to provide telecommunications service to as many people as possible without subjecting itself to charges that it has served, or at least attempted to serve, too many people.

In such situations, this Court has consistently held that the antitrust laws must yield to regulatory requirements, since otherwise a regulated company would be subjected to duplicative and inconsistent standards. *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 689 (1975); *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 721-22 (1975). See also *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 309 (1963).

In *Gordon*, the Court held that the antitrust laws could not be applied to price-fixing activities of the New York Stock Exchange because antitrust jurisdiction over these activities would subject the defendants to "conflicting standards" in view of the fact that these same activities are subject to the supervisory jurisdiction of the Securities and Exchange Commission under an inconsistent standard (422 U.S. at 689):

> "We agree with the District Court and the Court of Appeals, and with respondents, that to deny antitrust immunity with respect to commission rates would be to subject the exchanges and their members to *conflicting standards*. It is clear . . . that the commission rate practices of the exchanges have been subjected to the scrutiny and approval of the SEC. If antitrust courts were to impose different standards or requirements, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the SEC. Such different standards are likely to result because the sole aim of antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry." (Emphasis supplied.)

This principle was reiterated by the Court in its *NASD* decision. After considering the specific restraints on secondary market activities alleged in Counts II-VIII of the complaint in that case in light of the relevant statutory provisions, the Court concluded that the SEC had the statutory power to review such activities under a standard different from, and inconsistent with, the standard embodied in the antitrust laws. The Court viewed this conclusion as "necessarily" leading to a determination that the antitrust laws have no application to the challenged activities (422 U.S. at 721-22):

> ". . . this conclusion *necessarily* leads to a determination that they are immune from liability under the Sherman Act, for we see no way to reconcile the Commission's power to authorize these restrictions with the competing mandate of the antitrust laws." (Emphasis supplied.)

The decisions of this Court in *Gordon* and *NASD* are fully applicable to the Government's charges of monopolization here. The Government's contention to the contrary appears to rest primarily, if not solely, upon the fact that in recent years FCC policy has encouraged the development of a form of tightly regulated competition in the provision of certain telecommunications services. However, this fact in no way distinguishes either *Gordon* or *NASD*. Indeed, in both those cases, the SEC had abandoned, or was in the process of abandoning, the particular policy that had permitted the practices under attack.

Thus, *Gordon* involved a situation in which the SEC had already decided that the fixing of brokerage commission rates was not in the public interest and had developed a plan for competitive brokerage rates. The Court nonetheless held that the SEC's substitution of competitive commission rates for fixed rates had not in any way enlarged the scope of antitrust jurisdiction. Because the SEC's actions were founded on a determination that competition was in the public interest, not on any "simplistic notion in favor of competition," and because the regulatory scheme permitted the SEC later to reverse its position and reintroduce fixed rates, the Court concluded that the SEC's change of policy was essentially irrelevant to the question of antitrust jurisdiction (422 U.S. at 675-76, 690-91):

> "The required transition to competitive rates was based on the SEC's conclusion that competition, rather than fixed rates, would be in the best interests of the securities industry and markets, as well as in the best interests of the investing public and the national economy. This determination was not based on a simplistic notion in favor of competition, but rather on demonstrated deficiencies of the fixed commission rate structure."
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> "Significantly, . . . the Congress has explicitly provided that the SEC, under certain circumstances and upon the making of specified findings, may allow reintroduction of fixed rates." [74]

[74] In reaching this conclusion, the Court in *Gordon* pointed out that the Government's whole approach to the question of antitrust jurisdiction was unsound in that it rested upon a confusion between the legal issue of immunity and the factual issue of the relationship between particular conduct and regulatory policy (422 U.S. at 688):

> "We believe that the United States, as *amicus,* has confused two questions. On the one hand, there is a factual question as to whether fixed commission rates are actually necessary to the operation of the exchanges as contemplated under the Securities Exchange Act. On the other hand, there is a legal question as to whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme which specifically authorizes the SEC to oversee the fixing of commission rates. The factual question is not before us in this case. Rather, we are concerned with whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress. The issue of the wisdom of fixed rates becomes relevant only when it is determined that there is no antitrust immunity."

Similarly, in *NASD,* the Securities and Exchange Commission had decided to introduce "a controlled measure of competition" into the mutual fund industry. Nonetheless this Court held that the promulgation of such a regulatory policy by the responsible agency involved did not make that pervasively regulated industry subject to the antitrust laws (422 U.S. at 734). After expressly observing that the SEC had amended the rules of the National Association of Securities Dealers to substitute "limited price competition" for the restrictive rules that had been challenged, the Court proceeded to emphasize that the SEC's decision to enlarge competition in the mutual fund industry was just another exercise of its administrative authority to apply the public interest standard (*id.* at 728):

> "Even the SEC's recently expressed intention to introduce an element of competition in brokered transactions reflects measured caution as to the possibly adverse impact of a totally unregulated and unrestrained brokerage market on the primary distribution system."

For this reason, the Court concluded that the existence of "a controlled measure of competition"—originating

in and always remaining subject to the public interest standard—in no way limited the exclusive jurisdiction of the SEC over the activities involved (422 U.S. at 733-34):

> "[W]e hold that the Government's additional challenges to the alleged activities of the membership of the NASD . . . likewise are precluded by the regulatory authority vested in the SEC. . . . *And this conclusion applies with equal force now that the SEC has determined to introduce a controlled measure of competition into the secondary market.*" (Emphasis supplied.)

The same principle applies here. The inherent conflict between the Government's complaint and the common carrier obligations imposed upon the Bell System by regulatory statutes is in no way removed by the fact that the regulatory policies in vogue at this particular moment in time were, as in *NASD,* intended to inject "a controlled measure of competition" into a pervasively regulated activity. For the fact remains that the provision of telecommunications services is still regulated [75] and, even more so than in the case of the SEC's regulation of the securities industry, the particular

[75] The FCC has not deregulated, and under the Communications Act cannot deregulate, the provision of telecommunications common carrier services. *Cf. FPC* v. *Texaco, Inc.,* 417 U.S. 380 (1974). The regulated nature of the "competition" fostered by the FCC in recent years was described by Bernard Strassburg, then Chief of the Commission's Common Carrier Bureau, in a paper delivered to the Electronics Industries Association on October 12, 1970, as follows (p. 4):

> "[W]hen we refer to competition in regulated industries, we do not leap from pure monopoly to wide open competition where the influence of regulatory policy cannot be felt. Rather, we are referring to a gradual shift over time in the role of competitive forces in particular telecommunications sub-markets under the guidance and direction of regulatory policy."

regulatory policies in effect at any particular time are inherently subject to continuous review and change.[76]

In addition, as did the SEC in *NASD,* the FCC has taken the position that it too is moving with "measured caution as to the possibly adverse impact of" its new policies. Thus, the FCC expressly has taken on the responsibility to monitor the *effects* of the "competition" it has permitted [77]—a responsibility which in itself is totally inconsistent with the existence of competition.

[76] In a recent article, the Chairman of the FCC himself confirmed the inherently changing character of the Commission's policies, emphasizing the "obligatory" nature of the "need for regulatory change" and the need "to implement such change" required by the "flexibility of the public interest standard inherent in the Act":

> "The flexibility of the public interest standard inherent in the Act permits, and indeed requires, the agency not only to be cognizant of the need for regulatory change but also to implement such change wherever possible. Unlike the mandate of other independent regulatory agencies, which might remain unaffected by the need for continuing review, the Communications Act makes such periodic review obligatory, not discretionary, if the Commission is to meet its responsibilities under the Act."

Wiley, *Communications Law, Policy and Problems, Introduction,* 61 U. Va. L. Rev. 465, 469 (1975).

[77] In *United States Transmission Systems, Inc.,* 48 F.C.C.2d 859 (1974), the Commission granted an application by United States Transmission Systems (a subsidiary of International Telephone and Telegraph Company) to construct and operate a microwave system designed to provide specialized common carrier services between New York and Houston via Atlanta, notwithstanding the Commission's own recognition that this grant would result in "cream-skimming" (*supra,* note 60). On review of this decision in the Court of Appeals for the District of Columbia Circuit, the Commission's order was upheld even though the Court of Appeals acknowledged that, as a result of the decision, a "certain amount of 'cream-skimming' would naturally occur" (*American Tel. & Tel. Co.* v. *FCC,* 539 F.2d 767, 774 (D.C. Cir. 1976)). The court reasoned that the Commission itself was aware of this fact and that the Commission decided that the problem "can adequately be controlled by carefully monitoring implementation of its policy" (*id.*).

As this Court pointed out in *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 380 (1973), the Sherman Act is based upon the fundamental assumption "that an enterprise will protect itself against loss by operating with superior service, lower costs and improved efficiency." The FCC's decision to permit "a controlled measure of competition," the effects of which are to be monitored by the Commission itself, constitutes an entirely different approach. Under the FCC's approach, the general service carriers are relegated to reliance upon regulatory review that will monitor and manage the make-up of the market.

Moreover, it is plain that the entry of new participants into the provision of telecommunications common carrier services has *increased,* rather than lessened, the role of regulation. In fact, in the last few years, the Commission has been led to develop compendious sets of rules that govern in minute detail the Bell System's pricing of its services (*supra,* notes 7 and 8), the kinds of equipment that it must interconnect to its lines (*supra,* note 3), the manner in which it must work with other common carriers to provide joint service (*supra,* note 6), and a variety of other matters that dramatically emphasize the utter impossibility of any real competition in the provision of telecommunications services. Thus, the FCC's new policies have actually made application of the antitrust laws to the business of providing telecommunications service even *less* appropriate than it was prior to the *Carterfone* and *Specialized Common Carrier* decisions.

The Commission's new policies therefore in no way ameliorate the plain repugnancy between the antitrust laws and the pervasive scheme of common carrier regulation to which the Bell System is subject. The inherent differences between pervasively regulated "competition" and the unfettered competition in unregulated industries to which the antitrust laws were intended to apply simply compound the fundamental conflict between the Bell System's obligation to serve as many people as possible and the Government's charge that it has served too many people.

D. The Theories Advanced by the Government in the District Court Do Not Justify the Assertion of Antitrust Jurisdiction Over Pervasively Regulated Telecommunications Common Carrier Activities.

In the district court, the Government placed reliance upon two further factors as justifying the assertion of antitrust jurisdiction over this complaint. First, the Government contended that antitrust jurisdiction is appropriate in this case because of the initiative and discretion left to common carriers under the provisions of Title II of the Communications Act and comparable state statutes. Secondly, the Government contended that even beyond the question of carrier initiative and discretion, antitrust jurisdiction is appropriate because certain matters involved herein relate to generalized anticompetitive practices that bear no necessary relationship to regulated common carrier activities. As petitioners shall show below, neither of these contentions provides a sound basis for the assertion of antitrust jurisdiction in this case.

(i) The existence of some carrier initiative and discretion in the pervasive regulatory scheme provides no basis for the assertion of antitrust jurisdiction.

The contention that the existence of carrier initiative and discretion somehow makes the assertion of antitrust jurisdiction appropriate is totally unsound and

reflects a fundamental misapprehension both of the nature of the regulatory process and the responsibility of a regulatory agency charged with administering a pervasive scheme of common carrier regulation.

Each of the cases in which this Court has held pervasively regulated activities immune from the application of the antitrust laws has involved activities within the initiative and discretion of the regulated company. *Pan American,* for example, involved a division of territories agreement initiated by the defendant carriers. *Hughes* involved certain transactions entered into by the parties without a hint of compulsion from the CAB. And everything that was alleged to have occurred in *NASD* was initiated by the defendants in that case.

As already noted, the regulation of the activities involved in this case is more pervasive than the regulation in any of these prior cases and the multifaceted regulatory standard involved here is at least as inconsistent with respect to the antitrust charges made against the Bell System as it was with respect to the charges made against the airline carriers and mutual fund dealers involved in those cases. What the Government's argument comes down to then is an effort to rewrite—or, more accurately, to overrule *sub silentio*—every case this Court has decided with respect to implied immunity from antitrust liability based upon the existence of a pervasive regulatory scheme. Indeed, the Government's contention would trivialize the entire implied immunity doctrine to the point that it would never be applicable to any regulated activity except to the extent that such activity is directly compelled by a valid regulatory order with respect to which the regu-

lated company had absolutely no discretion and played no initiating role whatever.

Such an approach to accommodating the antitrust laws to regulatory statutes ignores the whole purpose of regulation, which is to provide a flexible and expert approach to problems too complicated for detailed resolution by a legislative body. *Secretary* v. *Central Roig Refining Co.,* 338 U.S. 604, 610 (1950). A regulatory agency can no more act solely through preannounced, compulsory rules and regulations that "define the multitudinous details appropriate" for regulation of vast and complex industries than could a legislative body itself. *Cf. Federal Crop Ins. Corp.* v. *Merrill,* 332 U.S. 380, 384 (1947). For this reason, public utility commissions must, if they wish to discharge their responsibility to regulate in the public interest, allow for utility initiative in the formulation of tariff proposals and other regulatory activities, and this is invariably the form that statutes regulating public utilities take. Indeed, the allowance of carrier-initiated tariffs is present in every regulatory statute applicable to common carriers or public utilities.[78]

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[78] Such provisions are present in all of the federal statutes of this kind. Thus, federal statutes typically provide that the regulated company shall file a tariff or schedule of rates, terms or conditions of service with the agency which shall become effective after a prescribed notice period unless suspended, rejected or modified by the agency. See, *e.g.*, 49 U.S.C. §§ 6, 317, 318, 906 (Interstate Commerce Act); 47 U.S.C. § 203 (Communications Act of 1934); 49 U.S.C § 1373 (Federal Aviation Act); 46 U.S.C. § 817 (Shipping Act of 1916) 16 U.S.C. § 824d (Federal Power Act); 15 U.S.C. § 717c (Natural Gas Act). The role of the regulated company in initiating changes in rates and services under these statutes has been consistently recognized by the Court and the courts of appeals. See, *e.g.*, *American Tel. & Tel. Co.* v. *FCC*, 487 F.2d 865, 880 (2d Cir. 1973) ("In enacting Sections 203-05 of the Communi-

This Court has consistently recognized this inherent quality of the regulatory process in cases involving efforts to apply the antitrust laws to regulated activities. Thus, in each case in which the Court has held that antitrust immunity must be implied to effectuate the intent of Congress it has recognized the existence of initiative in the regulatory scheme with respect to the very matters at issue. The Court has thus based its decisions, not on the existence or absence of iniatiative, but on the fact that the activities involved have been subject to pervasive regulatory supervision under a standard different from the competition standard of the antitrust laws. Essentially, the Court recognized that, in enacting a pervasive regulatory statute that inherently must involve some private initiative, Congress cannot rationally be presumed to have intended such initiative to be subject to pervasive regulatory supervision under one standard and at the same time subject to the antitrust laws under a conflicting standard. This same principle is applicable here.

Subjecting telecommunications common carriers to potential antitrust liability with respect to tariff proposals, interconnection practices, or service plans which are supposed to serve a public interest, not a competition, standard clearly would undercut the goals of regulation, for such potential liability would force the carriers to shape their proposals in accordance with the competition standard. This Court expressly recognized that fact in the *Cantor* case, holding that, although antitrust immunity was unavailable with respect to the matters involved in that case because the utility had gone outside the pervasive scheme of regulation to which it was subject (96 S. Ct. at 3114, 3120), the imposition of antitrust liability with respect to matters *central* to a pervasive regulatory scheme would render that scheme unworkable (96 S. Ct. at 3120 n.37).[79] *Cantor* thus makes it clear that so long as initiative and discretion are exercised within the confines of the area set aside for regulatory control, the fact that such features are inherent in the regulatory scheme in no way impairs the immunity of a common carrier from antitrust liability.

cations Act, Congress intended a specific scheme for carrier initiated rate revisions"); *United States* v. *S.C.R.A.P.*, 412 U.S. 669, 672 (1973) ("Under the Interstate Commerce Act, the initiative for rate increases remains with the railroads."); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341 (1956) ("all rates [under the Natural Gas Act] are established initially by the natural gas companies").

Here, there can be no real question that the FCC and state regulatory agencies have the ultimate power to

[79] This is particularly true with respect to an activity such as the provision of telecommunications common carrier services, since effective regulation of that kind of activity inherently depends upon a full appreciation of all of the intricate technical details of that industry. The Commission is not, and cannot be, fully knowledgeable about all of these details at all times. Consequently, it must, and does, depend upon the carriers themselves for much of the information and even the ideas necessary to the regulation of the industry. The FCC has expressly recognized this fact in a number of its proceedings. For example, the Commission stated that carrier-provided as well as customer-provided terminal equipment was subjected to its new registration program specifically in order to obtain the assistance of the telephone companies in formulating the standards for registration. *Interstate and Foreign MTS and WATS*, FCC 76-928 (Oct. 18, 1976). See also *Public Utilities Comm'n of California* v. *United States*, 356 F.2d 236 (9th Cir.), *cert. denied*, 385 U.S. 816 (1966). In such circumstances, it is unquestionably important—indeed, critical—to the proper working of the regulatory scheme established by Congress that the carriers be able to express their views to the Commission about the matters subject to its regulation free from threat of antitrust liability with respect to any proposals they make.

determine the appropriateness of Bell System tariffs, interconnection policies, and common carrier practices. The Communications Act places an affirmative duty upon the FCC to "execute and enforce the provisions" of the Act (47 U.S.C. § 151), and state regulatory statutes contain comparable provisions.[80] Moreover, if the Attorney General is not satisfied with the Commission's enforcement of the Communications Act, he is authorized to apply to any federal court to enforce its provisions.[81] Thus, under the scheme of regulation applicable to the activities of telecommunications common carriers, it is the responsibility of the Government—both the regulatory agency and the Department of Justice itself—to see that carrier initiative and discretion are controlled in accordance with the public interest standard of the regulatory scheme.

The ironic aspect of this case, however, is not that the responsibility and power to enforce the Act exist, but that the power has already been exercised and the

[80] *Cf. Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608, 620 (2d Cir. 1965):

> "[T]he Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission."

Accord, *National Ass'n of Indep. Television Producers & Distrib.* v. *FCC*, 502 F.2d 249, 257 (2d Cir. 1974).

[81] Section 401 of the Communications Act (47 U.S.C. § 401) empowers the Attorney General to enforce the provisions of the Act or any order of the Commission in any federal district court. See *United States* v. *Gris*, 247 F.2d 860 (2d Cir. 1957). Any charge brought by the Attorney General under Section 401 would, of course, be adjudicated under the public interest standard of the Communications Act, and not under the inconsistent competition standard of the antitrust laws.

responsibility essentially discharged. The Commission has considered and resolved, or is in the process of resolving, virtually every matter sought to be made the subject of the antitrust complaint filed by the Government in this case: it has more clearly defined the relationships between general service carriers and specialized common carriers and has even determined the rate-making principles that must be followed in the future; it has prescribed detailed rules that must be followed in the interconnection of customer-provided equipment; and it has reviewed, and continues to review, the vertically integrated structure and procurement practices of the Bell System.

Implicit in the Justice Department's whole approach to this case is that its real dissatisfaction lies, not with petitioners, but with regulation itself. The Department appears to be dissatisfied, either with the substantive policies being followed by the regulatory agencies, or more likely, with the time required by such agencies to develop and clarify their policies under the public interest standard. If that analysis is correct, an antitrust court surely is not the forum in which the Department of Justice should vent this grievance. Plainly, the Department should take this problem, if its exists, to the regulatory agencies themselves or to Congress instead of attempting to fabricate an antitrust case where no antitrust jurisdiction properly lies.

(ii) The Government's inclusion in the specific charges it has identified of a few generalized charges of anticompetitive conduct does not confer antitrust jurisdiction over the complaint here.

The Government has conceded in its memoranda and oral arguments in the district court that many—indeed, nearly all—of the charges encompassed within

the allegations of the complaint in this case relate directly to the pervasively regulated common carrier activities of the Bell System. However, the Government has asserted that the allegations of the complaint also include at least some matters that are not necessarily related to these activities. As examples purportedly in this category, the Government alleged that as part of a conspiracy and course of conduct to monopolize telecommunications services and equipment petitioners disparaged the services and products of competitors and engaged in reciprocal dealing arrangements.

The district court did not expressly embrace this theory. However, much of the reasoning of the district court's opinion seems to rest heavily upon the existence of these generalized charges of anticompetitive conduct. Thus, the district court reasoned that even though "some—or much—of the conduct" (App. A, p. 10a) upon which the Government based its monopolization and conspiracy charges was subject to the jurisdiction of the FCC, the court could exercise antitrust jurisdiction over "at least some of the aspects of the case" (App. A, p. 8a) and thus the court had "antitrust jurisdiction in this case" (App. A, p. 11a). To the extent that the district court actually meant to embrace the Government's contention that the inclusion of a handful of such generalized charges of anticompetitive conduct takes this case out of the exclusive jurisdiction of the FCC and state regulatory agencies, that part of its opinion is clearly erroneous.

Even assuming *arguendo* that antitrust jurisdiction could be exercised over some of the more general charges made by the Government, the district court plainly erred in treating the existence of antitrust jur-

isdiction over those charges as conferring jurisdiction over all of the charges encompassed within the Government's complaint. See ***Seatrain Lines, Inc.* v. *Pennsylvania R.R. Co.*,** 207 F.2d 255 (3d Cir.), *cert. denied,* 345 U.S. 916 (1953).[82]

Moreover, in this case, the Government's generalized charges are so clearly and directly related to the Bell System's activities within the scope of the pervasive regulatory scheme that they too must be summarily dismissed. As pointed out above, all of these charges relate to matters which the regulatory agencies have

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[82] In *Seatrain,* the complaint alleged activities by the defendant railroads to discourage shippers from shipping via Seatrain in violation of the Sherman Act. Among the activities alleged in the single count complaint, based principally upon a refusal of defendant railroads to interchange freight cars with Seatrain, were disparagement and dissemination of misinformation. The Third Circuit held that the interchange of freight cars by railroads in a through route relationship and all of the allegations of the complaint related to that matter were within the exclusive jurisdiction of the Interstate Commerce Commission. The Third Circuit also held, however, that the Commerce Act did not confer regulatory jurisdiction over the more general claims in that case and hence did not conflict with the assertion of antitrust jurisdiction over those claims—but that those claims over which the district court had antitrust jurisdiction could not be combined in one complaint with claims within the exclusive jurisdiction of the ICC. The court thus ordered the entire complaint dismissed without prejudice to the filing of an amended complaint limited to the claims over which the ICC had no jurisdiction (207 F.2d at 262):

> "[T]he alleged interference with customers by means beyond Commission control should be divorced from charges of customer interference by means within Commission control. Therefore, we think this case should not proceed upon the admixture of appropriate and inappropriate allegations and prayers which constitutes the present complaint, but rather that the judgment of dismissal should be vacated with leave to the plaintiff within a reasonable time to be fixed by the district court to file an amended complaint which shall contain only such matter as is appropriate."

full power to investigate in the course of proceedings involving the regulation of the Bell System's common carrier activities and with which such agencies have ample power to deal, if such charges are made and proved in those proceedings. Indeed, the FCC has investigated these very kinds of charges on numerous occasions in the past.[83]

As this Court made clear in *NASD*, generalized anticompetitive charges *within* the ancillary jurisdiction of regulatory agencies cannot support the assertion of jurisdiction over an antitrust complaint. In *NASD*, this Court was confronted with a similar attempt by the Government to confer antitrust jurisdiction upon a court by joining seven counts relating to specific regulated activities of the defendants designed to restrict the development of a secondary market in the mutual fund industry with a general conspiracy count based on various generalized charges of conduct allegedly motivated by the same objective, including the distribution of misleading information and the suppression of market quotations. Having found that the specific restraints alleged in the complaint were not subject to the antitrust laws as a result of the regulatory authority vested in the SEC, this Court

[83] The allegation that petitioners have disparaged competitors, for example, was investigated by the Commission in response to the allegations of competitors of the Bell System in Phase II of Docket No. 19129, *AT&T, Charges for Interstate Telephone Service*, FCC 76D-41 (Aug. 2, 1976). Although the Commission has not been called upon to investigate charges of reciprocal dealings leveled against telecommunications common carriers, it has investigated such allegations in several cases under the far less stringent provisions of Title III of the Act. See, *e.g.*, *ABC-ITT Merger*, 9 F.C.C.2d 546, 564-68 (1967); *Fidelity Television, Inc.* v. *FCC*, 515 F.2d 684 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975), *aff'g RKO General, Inc.*, 44 F.C.C.2d 123 (1973).

held that these generalized charges made by the Government were also beyond the jurisdiction of an antitrust court because, even if such activities occurred, they were designed to suppress competition in the same regulated market and the SEC had ample power to deal with them (422 U.S. at 733-34):

> "[T]he Commission's regulatory approval of the restrictive agreements challenged in Counts II-VIII cannot be reconciled with the Government's attack on the ancillary activities averred in Count I....
>
> "There can be little question that the broad regulatory authority conferred upon the SEC by the Maloney and Investment Company Acts enables it to monitor the activities questioned in Count I, and the history of Commission regulations suggests no laxity in the exercise of this authority. To the extent that any of appellees' ancillary activities frustrate the SEC's regulatory objectives it has ample authority to eliminate them."

In this respect, the *NASD* case reflects the application of a long-standing principle that dates at least as far back as this Court's decision in *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932). In *Cunard*, the heart of the complaint was directed at an alleged conspiracy to restrain and monopolize a portion of the North Atlantic trade through the use of a dual rate system, a practice held by this Court to be within the exclusive jurisdiction of the Shipping Board. In addition, however, plaintiffs had alleged several generalized anticompetitive activities designed to monopolize the same trade—including "giving rebates; spreading false rumors and falsely stating that petitioner is about to discontinue its service; making use

of their combined economic bargaining power to coerce various shippers, who are also producers of commodities used in large quantities by respondents, to enter into joint exclusive contracts with them; and threatening to blacklist forwarders and refuse to pay them joint brokerage fees unless they discontinue making, or advising shippers to make, shipments in petitioner's ships" (284 U.S. at 480). This Court ordered the entire complaint dismissed, holding that these ancillary charges were sufficiently related to the principal charges in the complaint as to constitute a component part of them, and that exclusive jurisdiction over the entire complaint lay with the Shipping Board.

The principles of *NASD* and *Cunard* are plainly applicable to the present case. All of the conduct alleged in the Government's complaint is subject to the exclusive jurisdiction of the FCC and state regulatory agencies, including those activities alleged by the Government in its memoranda and arguments which are reasonably ancillary to the provision of pervasively regulated common carrier services.

CONCLUSION

One of the major problems facing the American judicial system today is the proliferation of massive litigation that threatens literally to overwhelm limited judicial resources. This petition presents this Court with a unique opportunity—an opportunity to terminate at the outset litigation that has already spread to seven circuits for, as petitioners have shown, all of these cases involve the same jurisdictional question that is presented here and, hence, none of them is properly within the jurisdiction of an antitrust court. Moreover, even if petitioners are wrong and some limited anti-

trust jurisdiction exists over certain of the charges involved in this case, a definitive ruling by this Court could clarify the nature of that jurisdiction and greatly facilitate the handling of this and other cases. In these circumstances, petitioners respectfully submit that the Court should issue the writ requested, reverse the decision of the district court and order the complaint in this case dismissed.

Respectfully submitted,

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January 6, 1977

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1698

UNITED STATES OF AMERICA, *Plaintiff,*

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; and BELL TELEPHONE LABORATORIES, INC., *Defendants.*

Memorandum Opinion and Order on Jurisdictional Issues

(Filed November 24, 1976)

I.

This action arises under Sections 2 and 4 of the Sherman Antitrust Act, 15 U.S.C. §§ 2 and 4. Plaintiff is the United States of America, acting through the Department of Justice. Defendants are American Telephone and Telegraph Company (AT&T), Western Electric Company, Inc. (Western Electric), a wholly owned subsidiary of AT&T, and Bell Telephone Laboratories, Inc. (Bell Labs), jointly owned by AT&T and Western Electric.

The complaint broadly alleges that defendants, together with numerous co-conspirators, including 23 named telephone companies owned in whole or in part by AT&T, and their subsidiaries (Bell Operating Companies), have engaged in an unlawful combination and conspiracy to monopolize, have attempted to monopolize and have monopolized certain interstate trade and commerce in telecommunications equipment and submarkets thereof. Plaintiff seeks declaratory and injunctive relief, including complete divestiture of Western Electric by AT&T, divestiture by

Western Electric of some of its manufacturing and other assets, and divestiture by AT&T of some or all of its "Long Lines Department" from some or all of the Bell Operating Companies.

The defendants did not move to dismiss the complaint but in their answer to the complaint, they alleged the following affirmative defenses: (1) plaintiff fails to state a claim upon which relief can be granted; (2) the Court lacks subject matter jurisdiction; and (3) the matters sought to be litigated herein were previously litigated in a suit between the parties brought in 1949 in the United States District Court for the District of New Jersey, Civil Action No. 17-49, making the issues herein *res judicata*, and (4) that in the 1956 consent decree terminating Civil Action No. 17-49, the District Court of New Jersey retained exclusive jurisdiction to modify or terminate that decree.[1]

At a hearing on discovery motions held February 20, 1975, the Court indicated its concern over whether the jurisdictional defenses raised in the answer to the complaint were threshold matters which should be resolved before the expensive and protracted discovery inherent in the nature of this case was undertaken by the parties. The Court then *sua sponte* stayed discovery pending its determination of the jurisdictional questions.

Following extensive briefing and a hearing on July 23, 1975, the Court, on August 5, 1975, invited the Federal Communications Commission (Commission) to participate as *amicus curiae*. The Commission accepted the Court's invitation, submitting an *amicus curiae* brief addressing the jurisdictional issues. Subsequent to the Commission's submission, supplemental memoranda were filed by the Department of Justice and the defendants.

[1] By Order dated October 1, 1976, this Court determined: (1) that this action is not barred by the doctrine of *res judicata* because of Civil Action No. 17-49 in the United States District Court for the District of New Jersey; and (2) that the consent decree entered in Civil Action No. 17-49 does not require this Court to relinquish jurisdiction to the New Jersey Court.

Meanwhile, the Commission was engaged in various proceedings and made certain determinations which, it appeared to the Court, embraced some of the same 30 alleged actions and practices pinpointed in Addendum B to the Commission's *amicus* memorandum which it viewed as the basis of plaintiff's Sherman Act monopolization charges.

In light of the *amicus* submissions, and the recent proceedings and determinations by the Commission, the Court, by Order dated October 1, 1976, ordered a further hearing on whether the Federal Communications Act of 1934, 47 U.S.C. § 151, *et seq.* (the Communications Act), and the regulations promulgated pursuant thereto, compelled the conclusion that there was an implied repeal of the antitrust laws. Also included, of necessity, was further consideration of the extent to which exclusive jurisdiction rested with the Commission, and whether and to what extent the doctrine of primary jurisdiction should be invoked. Supplemental memoranda were filed by the parties and the Commission, and a hearing held November 16, 1976.

Briefly stated, defendants contend they enjoy implied immunity from antitrust liability because they are subject to a pervasive scheme of regulation imposed by the Federal Communications Act and state regulatory statutes. They contend that this pervasive regulatory scheme, based as it is upon the public interest standard, is flatly inconsistent with the competition standards underlying antitrust law. With respect to the question of primary jurisdiction, defendants contend that because the Court has no antitrust jurisdiction herein, the question of primary jurisdiction cannot arise, and would not be an appropriate exercise of discretion in this case. Recent Commission decisions, they assert, represent primarily, attempts by the Commission to control anticompetitive behavior initiated by defendants through tariff filings.

Plaintiff contends that Congressional intent is the standard to be applied, and that in this case, neither an express, nor an implied immunity from antitrust liability was intended nor exists. Plaintiff sees absolutely no irreconcilable conflict arising under the Communications Act and the Sherman Act, and contends that the Commission's regulations and recent decisions in proceedings do not in any way affect the statutory scheme, or the antitrust jurisdiction of this Court.

The Commission, as *amicus,* finds no blanket immunity from antitrust liability. It does, however, assert that the following three areas are impliedly delegated to the Commission's exclusive jurisdiction which antitrust courts should not disturb by *ad hoc* rulings: (1) in view of Section 214 of the Act, only the Commission may require, through its certification process, entry into or exit from a communications common carrier market; (2) in view of Section 201 of the Act, antitrust courts should not countermand Commission orders requiring carriers to interconnect their telephone systems; and (3) in view of Section 205 of the Act, courts should not base antitrust relief or remedies upon tariff provisions or conduct pursuant to tariff provisions which the Commission has either "approved or prescribed" after the required investigation.

The Commission urges the Court to refer unsettled issues which may substantially affect the Commission's regulatory policies to the Commission under the doctrine of primary jurisdiction and to take judicial notice where the Commission has settled such questions, so as to reconcile the regulatory scheme and the scheme of the antitrust laws.

II.

The Federal Communications Act of 1934 contains no express statement of immunity and defendants do not claim the Act expressly exempts them from the antitrust laws. Therefore, immunity, if it exists, must be implied from

the statutory scheme and the regulatory powers exercised by the Commission.

When faced with implied immunity questions, the courts have undertaken a case-by-case approach which analyzes the particular industry, the applicable regulatory scheme and procedures, and the statutory history to determine whether operation of the antitrust laws can be reconciled with the regulatory scheme. Where reconciliation cannot be achieved, the antitrust laws must give way.

When Congress passed the Communications Act in 1934, it was well aware of the dominance of AT&T of the telecommunications industry inasmuch as AT&T *was* the telecommunications industry.[2] Provisions of older interstate commerce acts were retained, and new provisions incorporated. The stated purpose of the Communications Act is

> ". . . to make available, so far as possible, to all people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, . . ." 47 U.S.C. § 151.

Common carriers are regulated under Title II of the Communications Act, 47 U.S.C. §§ 201-223. The Commission summarizes its mission with respect to common carriers as follows: "(1) to create and maintain a rapid, efficient communications network; (2) to ensure that adequate facilities are provided for the network; and (3) to require the provision of service pursuant to tariffs offering just and reasonable rates, practices, procedures and regulations."[3] Additionally, the Commission has been granted remedial powers sufficient to ensure compliance with its mandate.

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[2] Emphasis added.

[3] Memorandum of Federal Communications Commission as *Amicus Curiae,* at 8.

Title II of the Communications Act creates a scheme embodying extensive regulatory control. *United States* v. *Radio Corporation of America,* 358 U.S. 334, 349 (1959). However, nothing in the history of federal regulation of the telecommunications industry, beginning with the Mann-Elkins Act of June 18, 1910, 36 Stat. 539, and the Willis-Graham Act cf 1921, 42 Stat. 27, and continuing through the Communications Act of 1934, including its legislative history, compels the conclusion that Congress envisioned immunity from antitrust liability.

Such immunity may, however, still be implied if an irreconcilable conflict between the regulatory statute and the antitrust laws exists. It is upon this theory that defendants chiefly rely. In their view, pervasive regulation by federal and state agencies automatically confers antitrust immunity. Alternative grounds supporting their contention of immunity are based on asserted inconsistent standards embodied within the regulatory scheme and antitrust laws.

The Supreme Court has addressed the issue of implied immunity from antitrust laws on a number of occasions. At the heart of each of the Supreme Court's decisions involving implied immunity from antitrust laws is a strong disfavor to find that the regulatory scheme completely displaces antitrust laws. *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296 (1963); *Hughes Tool Co.* v. *Trans World Airlines,* 409 U.S. 363 (1973). This basic principle is particularly true where commercial relationships "are governed in the first instance by business judgment and not regulatory coercion." *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 374 (1973).

The *Otter Tail* Court held that the power company, although subject to extensive regulation by the Federal Power Commission, was not immune from antitrust action under Section 2 of the Sherman Act. Quoting from *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 350-51 (1973), the Court emphasized that

> "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust provisions and regulatory provisions." *Otter Tail Power Co.* v. *United States, supra* at 372.

The Court then went on to observe that "activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws." *Id.*

It is true that a regulatory scheme may be so pervasive that it must displace the antitrust laws in particular and discrete instances. *United States* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694, 735 (1975). In each instance, however, the concern has been whether different and potentially conflicting standards with respect to particularized activities and conduct may result, thereby threatening the agency's ability to carry-out its regulatory mandate. Immunity is to be implied only where it is necessary to make the regulatory statutes work, and even then only to the minimum extent necessary. *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357 (1963).

These basic axioms of construction were recently reaffirmed in *Gordon* v. *New York Stock Exchange, Inc.,* 422 U.S. 659, 682-683 (1975), and *United States* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694, 719-720 (1975).

Merely because Congress has authorized the Commission to regulate the telecommunications industry (even assuming that regulation is viewed as being pervasive) does not automatically necessitate the conclusion that the antitrust laws are to be displaced. As Mr. Justice Harlan observed in his concurring opinion in *United States* v. *Radio Corporation of America, supra* at 353:

"... a Commission determination of 'public interest, convenience, and necessity' cannot either constitute a binding adjudication upon any antitrust issues that may be involved in the Commission's proceeding or serve to exempt a licensee *pro tanto* from the antitrust laws, ..."

The Court therefore concludes that the Communications Act does not expressly, or impliedly, repeal the antitrust laws. Neither the language, nor the legislative history of the Communications Act supports the conclusion that Congress intended by that Act to grant a total, blanket immunity to defendants from application of antitrust laws, and to place exclusive jurisdiction over all their conduct in the Federal Communications Commission.

The Court further concludes that neither the Act, nor the regulations promulgated pursuant thereto, nor the recent proceedings and determinations by the Commission necessitate or support the conclusion that there has been an implied repeal of the antitrust laws with respect to all of the conduct of defendants embraced within the complaint. The Court is satisfied that it has antitrust jurisdiction of at least some of the aspects of the case.

III.

Having determined the defendants are not completely immune from the antitrust laws, the Court turns next to the applicability of referral to the Commission under the doctrine of primary jurisdiction.

Primary jurisdiction issues arise in antitrust litigation where, as here, "conduct seemingly within the reach of the antitrust laws is also at least arguably protected or prohibited by another regulatory statute enacted by Congress." *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289, 299-300 (1973).

The procedure typically followed is for the antitrust court to refer preliminary factual and legal questions to the agency while retaining ultimate jurisdiction and "the final authority to expound the statute." *Ricci, supra* at 305, quoting from *Federal Maritime Board* v. *Isbrandtsen, Co.,* 356 U.S. 481, 498 (1958). The question of immunity, of course, is not before the agency.

This "prior resort" approach is grounded on the necessity for administrative uniformity and the need for administrative skills found within the appropriate body of experts in handling intricate facts, *United States* v. *Radio Corporation of America, supra* at 346, and grows out of the need to resolve possible conflicts between the antitrust policy of free competition and the regulatory standards. In this case, the regulatory standard is the public interest, convenience and necessity. 47 U.S.C. § 201, 214. However, competition is, without a doubt, a factor to be weighed in determining where the public interest lies. *Hawaiian Telephone Company* v. *F.C.C.,* 498 F.2d 771, 776 (D.C. Cir. 1974).

Referrals have been used in the past in antitrust suits dealing with communications common carriers as the means of accommodating the overlapping jurisdictions.[4] See, *e.g., United States* v. *Radio Corporation of America, supra; Carter* v. *AT&T,* 365 F.2d 486 (5th Cir. 1966); *Chastain* v. *AT&T,* 401 F. Supp. 151 (D.D.C. 1975).

As Judge Gasch observed in the *Chastain* case:

"The purpose of referrals to regulatory agencies pursuant to the doctrine of primary jurisdiction is simply to give the relevant regulatory agency the opportunity to determine the reasonableness and

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[4] The Commission has encouraged the Court to utilize the procedure by means of a precise referral order calling upon the agency to address specific questions under the Communications Act. Supplemental Memorandum of F.C.C. as *Amicus Curiae,* at 5.

> validity of the challenged practice under the regulatory scheme before the Court determines the reasonableness and validity of the practice under the antitrust laws. In this way the primary jurisdiction doctrine seeks to prevent 'sporadic action by federal courts . . . [from] disrupt[ing] an agency's delicate regulatory scheme.'" *Chastain* v. *AT&T, supra* at 157, quoting from *United States* v. *Radio Corporation of America, supra* at 348.

Moreover, when certain basic communications issues arise in antitrust proceedings, the regulatory scheme prescribed in Title II of the Communications Act for common carriers would seemingly make referral to the Federal Communications Commission imperative. *Carter* v. *AT&T, supra* at 498-499.

Accordingly, it appears to the Court, based upon all of the matters that have come before it, including recent Commission activities, that some—or much—of the conduct and practices of defendants upon which plaintiff bases its charges of conspiracy to monopolize, attempts to monopolize and monopolization might well be subject to the doctrine of primary jurisdiction. The Court, in its discretion, will in the future, consider referring particular issues to the Commission at the appropriate time. At this stage in the proceedings, however, the issues must be more sharply defined through discovery and other proceedings permissible under the Federal Rules of Civil Procedure.

IV.

Defendants, in their answer to the complaint, asserted that the complaint fails to state a claim upon which relief can be granted. With respect to the argument that the complaint is vague, the Court agrees that it is vague. However, the failure of the complaint to set forth specific acts to support its general allegations of antitrust jurisdiction is not sufficient grounds for dismissal since the Federal Rules of Civil Procedure do not require a complainant to set out in detail all of the facts upon which he bases complaint. *Conley* v. *Gibson,* 355 U.S. 41 (1957).

The Rules also provide for a more definite statement, discovery proceedings, depositions, and other pretrial procedures, all of which can add content to the complaint. The Court notes that already allegations of more specific conduct and activity on the part of defendants have surfaced in plaintiff's various memoranda.

V.

In summary, inasmuch as neither party has made a motion raising the jurisdictional issues, the Court, *sua sponte,* finds and orders: (1) that defendants do not have blanket immunity from antitrust liability, either expressly or by implication; (2) that the Court has antitrust jurisdiction in this case; and (3) that should it become necessary in the course of these proceedings, the Court will consider the appropriateness of referring certain issues to the Federal Communications Commission under the doctrine of primary jurisdiction.

These determinations and orders shall govern the future course of this litigation unless subsequently changed by order of the Court.

/s/ Joseph C. Waddy
Joseph C. Waddy
United States District Judge

Dated: November 24, 1976

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1698

(Filed Dec. 22, 1976, James F. Davey, *Clerk*)

UNITED STATES OF AMERICA, *Plaintiff*,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; and BELL TELEPHONE LABORATORIES, INC., *Defendants.*

Order

The Court having fully considered defendants' Motion to Dismiss the Complaint in this case filed on December 22, 1976, it is by the Court this 22nd day of December, 1976,

ORDERED that Defendants' Motion to Dismiss is denied for the reasons set forth in the MEMORANDUM OPINION AND ORDER ON JURISDICTIONAL ISSUES, entered by the Court on November 24, 1976.

/s/ JOSEPH C. WADDY
Joseph C. Waddy
United States District Judge

APPENDIX C

Statutory Provisions Involved

Sherman Act

Section 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 2, provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, . . .

Communications Act of 1934

Title I, Sections 1, 2, 3 and 4 of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151, 152, 153, 154, provides in pertinent part:

> *Sec. 1. Purposes of Act; creation of Federal Communications Commission*
>
> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

Sec. 2. Application of Act

(a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; . . .

(b) Subject to the provisions of section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 through 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4).

Sec. 3 Definitions

For the purposes of this Act, unless the context otherwise requires—

. . .

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of title II of this Act (other than section 223 thereof) include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communications is regulated by a State commission.

. . .

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

. . .

Sec. 4. Provisions relating to the Commission

. . .

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. . . .

. . .

Title II, Sections 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 213, 214, 215, 218, 219, 220 and 221 of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 201-211, 213-215, 218-221, provides in pertinent part:

Sec. 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . .

Sec. 202. Discriminations and preferences

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this Act include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $500 for each such offense and $25 for each and every day of the continuance of such offense.

Sec. 203. Schedules of charges; filing with Commission; changes in schedules; overcharges and rebates; penalty for violations

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation re-

quire, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) (1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after ninety days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by a general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than ninety days.

(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities, in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or

of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense.

Sec. 204. Hearings on new charges; suspension pending hearing; refunds

(a) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or an increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or increased charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, the burden of proof to show that the increased charge, or

proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a).

Sec. 205. Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the

classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

Sec. 206. Carriers' liability for damages

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Sec. 207. Recovery of damages

Any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

Sec. 208. Complaints to Commission; investigations

Any person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a state-

ment of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Sec. 209. Orders for payment of money

If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

Sec. 210. Franks and passes; free service to governmental agencies in connection with national defense

. . .

(b) Nothing in this Act or in any other provision of law shall be construed to prohibit common carriers from rendering to any agency of the Government free service in connection with the preparation for the national defense: *Provided,* That such free service may be rendered only in accordance with such rules and regulations as the Commission may prescribe therefor.

Sec. 211. Contracts of carriers; filing with Commission

(a) Every carrier subject to this Act shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with

common carriers not subject to the provisions of this Act, in relation to any traffic affected by the provisions of this Act to which it may be a party.

(b) The Commission shall have authority to require the filing of any other contracts of any carrier, and shall also have authority to exempt any carrier from submitting copies of such minor contracts as the Commission may determine.

Sec. 213. Valuation of property of carrier

(a) The Commission may from time to time, as may be necessary for the proper administration of this Act, and after opportunity for hearing, make a valuation of all or of any part of the property owned or used by any carrier subject to this Act, as of such date as the Commission may fix.

(b) The Commission may at any time require any such carrier to file with the Commission an inventory of all or of any part of the property owned or used by said carrier, which inventory shall show the units of said property classified in such detail, and in such manner, as the Commission shall direct, and shall show the estimated cost of reproduction new of said units, and their reproduction cost new less depreciation, as of such date as the Commission may direct; and such carrier shall file such inventory within such reasonable time as the Commission by order shall require.

(c) The Commission may at any time require any such carrier to file with the Commission a statement showing the original cost at the time of dedication to the public use of all or of any part of the property owned or used by said carrier. For the showing of such original cost said property shall be classified, and the original cost shall be defined, in such manner as the Commission may prescribe; and if any part of such cost cannot be determined from accounting or other records, the portion of the property for which such cost cannot be determined shall be reported to the Commission; and, if the Commission shall so direct, the original cost thereof shall be estimated in such manner as the Commission may prescribe. If the carrier

owning the property at the time such original cost is reported shall have paid more or less than the original cost to acquire the same, the amount of such cost of acquisition, and any facts which the Commission may require in connection therewith, shall be reported with such original cost. The report made by a carrier under this subsection shall show the source or sources from which the original cost reported was obtained, and such other information as to the manner in which the report was prepared, as the Commission shall require.

(d) Nothing shall be included in the original cost reported for the property of any carrier under subsection (c) of this section on account of any easement, license, or franchise granted by the United States or by any State or political subdivision thereof, beyond the reasonable necessary expense lawfully incurred in obtaining such easement, license, or franchise from the public authority aforesaid, which expense shall be reported separately from all other costs in such detail as the Commission may require; and nothing shall be included in any valuation of the property of any carrier made by the Commission on account of any such easement, license, or franchise, beyond such reasonable necessary expense lawfully incurred as aforesaid.

(e) The Commission shall keep itself informed of all new construction, extensions, improvements, retirements, or other changes in the condition, quantity, use, and classification of the property of common carriers, and of the cost of all additions and betterments thereto and of all changes in the investment therein, and may keep itself informed of current changes in costs and values of carrier properties.

(f) For the purpose of enabling the Commission to make a valuation of any of the property of any such carrier, or to find the original cost of such property, or to find any other facts concerning the same which are required for use by the Commission, it shall be the duty of each such carrier to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including

copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and to cooperate with and aid the Commission in the work of making any such valuation or finding in such manner and to such extent as the Commission may require and direct, and all rules and regulations made by the Commission for the purpose of administering this section shall have the full force and effect of law. Unless otherwise ordered by the Commission, with the reasons therefor, the records and data of the Commission shall be open to the inspection and examination of the public. The Commission, in making any such valuation, shall be free to adopt any method of valuation which shall be lawful.

. . .

(h) Nothing in this section shall impair or diminish the powers of any State commission.

Sec. 214. Extension of lines; certificate of public convenience and necessity; discontinuance of service

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided,* That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further,* That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities,

without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however,* That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects, to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States $100 for each day during which such refusal or neglect continues.

Sec. 215. Services, equipment, etc.; examination of transactions by Commission

(a) The Commission shall examine into transactions entered into by any common carrier which relate to the furnishing of equipment, supplies, research, services, finances, credit, or personnel to such carrier and/or which may affect the charges made or to be made and/or the services rendered or to be rendered by such carrier, in wire or radio communication subject to this

Act, and shall report to the Congress whether any such transactions have affected or are likely to affect adversely the ability of the carrier to render adequate service to the public, or may result in any undue or unreasonable increase in charges or in the maintenance of undue or unreasonable charges for such service; and in order to fully examine into such transactions the Commission shall have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, of persons furnishing such equipment, supplies, research, services, finances, credit, or personnel. The Commission shall include in its report its recommendations for necessary legislation in connection with such transactions, and shall report specifically whether in its opinion legislation should be enacted (1) authorizing the Commission to declare any such transactions void or to permit such transactions to be carried out subject to such modification of their terms and conditions as the Commission shall deem desirable in the public interest; and/or (2) subjecting such transaction to the approval of the Commission where the person furnishing or seeking to furnish the equipment, supplies, research, services, finances, credit, or personnel is a person directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier; and/or (3) authorizing the Commission to require that all or any transactions of carriers involving the furnishing of equipment, supplies, research, services, finances, credit, or personnel to such carrier be upon competitive bids on such terms and conditions and subject to such regulations as it shall prescribe as necessary in the public interest.

(b) The Commission shall investigate the methods by which and the extent to which wire telephone companies are furnishing wire telegraph service and wire telegraph companies are furnishing wire telephone service, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable.

(c) The Commission shall examine all contracts of common carriers subject to this Act which prevent the other party thereto from dealing with another common carrier subject to this Act, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable.

Sec. 218. Management of business; inquiries by Commission

The Commission may inquire into the management of the business of all carriers subject to this Act, and shall keep itself informed as to the manner and method in which the same is conducted and as to technical developments and improvements in wire and radio communication and radio transmission of energy to the end that the benefits of new inventions and developments may be made available to the people of the United States. The Commission may obtain from such carriers and from persons directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created.

Sec. 219. Reports by carriers; contents and requirements generally

(a) The Commission is authorized to require annual reports from all carriers subject to this Act, and from persons directly or indirectly controlling or controlled by, or under direct or indirect common control with, any such carrier, to prescribe the manner in which such reports shall be made, and to require from such persons specific answers to all questions upon which the Commission may need information. Except as otherwise required by the Commission, such annual reports shall show in detail the amount of capital stock issued, the amount and privileges of each class of stock, the amounts paid therefor, and the manner of payment for the same; the dividends paid and the surplus fund, if any; the number of stockholders (and the names of the thirty largest holders of each class of stock and the amount held by each); the funded and floating debts and the in-

terest paid thereon; the cost and value of the carrier's property, franchises, and equipment; the number of employees and the salaries paid each class; the names of all officers and directors, and the amount of salary, bonus, and all other compensation paid to each; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to charges or regulations concerning charges, or agreements, arrangements, or contracts affecting the same, as the Commission may require.

(b) Such reports shall be for such twelve months' period as the Commission shall designate and shall be filed with the Commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time is granted in any case by the Commission; and if any person subject to the provisions of this section shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such person shall forfeit to the United States the sum of $100 for each and every day it shall continue to be in default with respect thereto. The Commission may by general or special orders require any such carriers to file monthly reports of earnings and expenses and to file periodical and/or special reports concerning any matters with respect to which the Commission is authorized or required by law to act. If any such carrier shall fail to make and file any such periodical or special report within the time fixed by the Commission, it shall be subject to the forfeitures above provided.

Sec. 220. Accounts, records, and memoranda; depreciation charges; forfeitures and penalties

(a) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to this Act, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys.

(b) The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the classes of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

(c) The Commission shall at all times have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carrier and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or

requiring such entry and the Commission may suspend a charge or credit pending submission of proof by such person. Any provision of law prohibiting the disclosure of the contents of messages or communications shall not be deemed to prohibit the disclosure of any matter in accordance with the provisions of this section.

(d) In case of failure or refusal on the part of any such carrier to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, memoranda, documents, papers, and correspondence as are kept to the inspection of the Commission or any of its authorized agents, such carrier shall forfeit to the United States the sum of $500 for each day of the continuance of each such offense.

(e) Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by any such carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction, to a fine of not less than $1,000 nor more than $5,000 or imprisonment for a term of not less than one year nor more than three years, or both such fine and imprisonment: *Provided,* That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, or documents which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

. . .

(g) After the Commission has prescribed the forms and manner of keeping of accounts, records, and memoranda to be kept by any person as herein provided, it

shall be unlawful for such person to keep any other accounts, records, or memoranda than those so prescribed or such as may be approved by the Commission or to keep the accounts in any other manner than that prescribed or approved by the Commission. Notice of alterations by the Commission in the required manner or form of keeping accounts shall be given to such persons by the Commission at least six months before the same are to take effect.

(h) The Commission may classify carriers subject to this Act and prescribe different requirements under this section for different classes of carriers, and may, if it deems such action consistent with the public interest, except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates.

(i) The Commission, before prescribing any requirements as to accounts, records, or memoranda, shall notify each State commission having jurisdiction with respect to any carrier involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations.

(j) The Commission shall investigate and report to Congress as to the need for legislation to define further or harmonize the powers of the Commission and of State commissions with respect to matters to which this section relates.

Sec. 221. Telephone companies; consolidation; state jurisdiction over services, charges, etc., unaffected; determination of property used in interstate toll service; valuation

(a) Upon application of one or more telephone companies for authority to consolidate their properties or a part thereof into a single company, or for authority for one or more such companies to acquire

the whole or any part of the property of another telephone company or other telephone companies or the control thereof by the purchase of securities or by lease or in any other like manner, when such consolidated company would be subject to this chapter, the Commission shall give reasonable notice in writing to the governor of each of the States in which the physical property affected, or any part thereof, is situated, and to the State commission having jurisdiction over telephone companies, and to such other persons as it may deem advisable, and shall afford all parties a reasonable opportunity to submit comments on the proposal. A public hearing shall be held in all cases where a request therefor is made by a telephone company, an association of telephone companies, a State commission, or local governmental authority. If the Commission finds that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any Act or Acts of Congress making the proposed transaction unlawful shall not apply. Nothing in this subsection shall be construed as in anywise limiting or restricting the powers of the several States to control and regulate telephone companies.

(b) Subject to the provisions of section 301, nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

(c) For the purpose of administering this Act as to carriers engaged in wire telephone communication, the Commission may classify the property of

any such carrier used for wire telephone communication, and determine what property of said carrier shall be considered as used in interstate or foreign telephone toll service. Such classification shall be made after hearing, upon notice to the carrier, the State commission (or the Governor, if the State has no State commission) of any State in which the property of said carrier is located, and such other persons as the Commission may prescribe.

(d) In making a valuation of the property of any wire telephone carrier the Commission, after making the classification authorized in this section, may in its discretion value only that part of the property of such carrier determined to be used in interstate or foreign telephone toll service.

Title IV, Sections 401, 403 and 410 of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 401, 403, 410, provides in pertinent part:

Sec. 401. Enforcement of chapter and orders of Commission; jurisdiction

(a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this Act by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this Act.

(b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedi-

ence of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

(c) Upon the request of the Commission it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

Sec. 403. Inquiry by Commission on its own motion

The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

Sec. 410. Use of Joint Boards—Cooperation with State commission.

(a) Except as provided in section 409, the Commission may refer any matter arising in the administration of this Act to a joint board to be composed of a member, or of an equal number of members, as determined by the Commission, from each of the States in

which the wire or radio communication affected by or involved in the proceeding takes place or is proposed. For purposes of acting upon such matter any such board shall have all the jurisdiction and powers conferred by law upon an examiner provided for in section 11 of the Administrative Procedure Act, designated by the Commission, and shall be subject to the same duties and obligations. The action of a joint board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The joint board member or members for each State shall be nominated by the State commission of the State or by the Governor if there is no State commission, and appointed by the Federal Communications Commission. The Commission shall have discretion to reject any nominee. Joint board members shall receive such allowances for expenses as the Commission shall provide.

(b) The Commission may confer with any State commission having regulatory jurisdiction with respect to carriers, regarding the relationship between rate structures, accounts, charges, practices, classifications, and regulations of carriers subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized under such rules and regulations as it shall prescribe to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this Act to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) The Commission shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations, which it institutes pursuant to a notice of proposed rulemaking and, except as provided in section 409 of this Act, may refer any other matter, relating to common carrier communications of joint Federal-State concern, to a Federal-State Joint Board. The Joint Board shall possess the same jurisdiction, powers, duties, and obligations as a joint board estab-

lished under subsection (a) of this section, and shall prepare a recommended decision for prompt review and action by the Commission. In addition, the State members of the Joint Board shall sit with the Commission en banc at any oral argument that may be scheduled in the proceeding. The Commission shall also afford the State members of the Joint Board an opportunity to participate in its deliberations, but not vote, when it has under consideration the recommended decision of the Joint Board or any further decisional action that may be required in the proceeding. The Joint Board shall be composed of three Commissioners of the Commission and of four State commissioners nominated by the national organization of the State commissions, as referred to in sections 202(b) and 205(f) of the Interstate Commerce Act, and approved by the Commission. The Chairman of the Commission, or another Commissioner designated by the Commission, shall serve as Chairman of the Joint Board.

All Writs Act

Section 1651 of Title 28, United States Code, 62 Stat 944, as amended, commonly known as the All Writs Act, 28 U.S.C. § 1651, provides in pertinent part:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. . . .

Expediting Act

Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. § 29, provides in pertinent part:

> (a) Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United

> States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to sections 1291 and 2107 of Title 28. Any appeal from an interlocutory order entered in any such action shall be taken to the court of appeals pursuant to sections 1292(a)(1) and 2107 of Title 28 but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in section 1254(1) of Title 28.
>
> (b) An appeal from a final judgment pursuant to subsection (a) of this section shall lie directly to the Supreme Court if, upon application of a party filed within fifteen days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice. Such order shall be filed within thirty days after the filing of a notice of appeal. When such an order is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. The Supreme Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross appeal therein had been docketed in the court of appeals in the first instance pursuant to subsection (a) of this section.

State Statutes Regulating Telecommunications Common Carriers

Alabama Code tit. 48, chs. 1, 2, 6.

Arizona Const. art. 15, Arizona Rev. Stat. tit. 42, chs. 1, 2.

Arkansas Stat. Ann. tit. 73, chs. 1, 2, 18.

California Public Utilities Code div. 1, pt. 1, chs. 1-5 (Deering).

Colorado Rev. Stat. tit. 40, arts. 1-7.

Connecticut Gen. Stat. tit. 16, chs. 277, 283.

Delaware Code tit. 26, chs. 1, 9.

Florida Stat. Ann. chs. 350, 363, 364.

Georgia Code Ann. tit. 93, chs. 1-5, 9; tit. 104, ch. 2.

Idaho Code tit. 61, chs. 1-7, 9.

Illinois Rev. Stat. ch. 111⅔, arts. 1-5.

Indiana Code Ann. tit. 8, art. 1, chs. 1, 2, 4, 5, 17, 18, 19 (Burns).

Iowa Code Ann. chs. 488, 490A (West).

Kansas Stat. ch. 66, arts. 66-1, 66-12, 66-14, 66-15.

Kentucky Const. §§ 199-201; Kentucky Rev. Stat. Ann. ch. 278.

Louisiana Civ. Code Ann. tit. 45, chs. 8, 9, pt. 5 (West).

Maine Rev. Stat. tit. 35, pts. 1, 5.

Maryland Ann. Code art. 23, §§ 317-322; art. 78.

Massachusetts Gen. Laws Ann. chs. 159, 166 (West).

Michigan Stat. Ann. tit. 22, chs. 208, 209, 219, §§ 22.1111-22.1113; 225, 226.

Minnesota Stat. ch. 237.

Mississippi Code Ann. tit. 77, chs. 1, 3.

Missouri Rev. Stat. ch. 392.

Montana Rev. Codes tit. 70.

Nebraska Rev. Stat. ch. 75, arts. 1, 6-8.

Nevada Rev. Stat. tit. 58, chs. 703, 704, 707.

New Hampshire Rev. Stat. Ann. chs. 362, 363, 365, 366, 369, 370, 374, 378, 379.

New Jersey Stat. Ann. tit. 48, chs. 2, 3, 17.

New Mexico Const. art. 11, §§ 6-16; New Mexico Stat. Ann. chs. 68, 69, arts. 7, 9, 10.

New York Pub. Serv. Law arts. 1, 5 (McKinney).

North Carolina Gen. Stat. ch. 62, arts. 1-9, 13, 15.

North Dakota Cent. Code tit. 8, chs. 8-10; tit. 49, chs. 49-01 through 49-07, 49-21.

Ohio Rev. Code Ann. tit. 49, chs. 4901, 4903, 4905, 4909, 4931 (Page).

Oklahoma Const. art. 9; Oklahoma Stat. tit. 17, chs. 1, 5, 6, 10, 11; tit. 13, chs. 1, 4.

Oregon Rev. Stat. tit. 57, chs. 756-758.

Pennsylvania Stat. Ann. tit. 66, chs. 4, 7; tit. 15, ch. 13 (Purdon).

Rhode Island Gen. Laws tit. 39, chs. 1-5, 17.

South Carolina Code tit. 58, chs. 1, 2, 5-8.

South Dakota Compiled Laws Ann. tit. 49, chs. 49-1, 49-2, 49-3, 49-6 through 49-14, 49-30, 49-31, 49-32.

Tennessee Code Ann. tit. 65, chs. 1, 2, 4, 5, 21, 30.

Texas Rev. Civ. Stat. Ann. tit. 32, ch. 10, art. 1446c (Vernon, 1976-1977 Supp.).

Utah Code Ann. tit. 54, chs. 1-4.

Vermont Stat. Ann. tit. 30, chs. 1, 5, 7, 71, 73, 75.

Virginia Code Ann. tit. 56, chs. 1-5, 15.

Washington Const. art. 12, § 19; Washington Rev. Code tit. 80, chs. 80.01, 80.04, 80.08, 80.12, 80.16, 80.20, 80.36.

West Virginia Code ch. 24, arts. 1-4.

Wisconsin Stat. tit. 17, chs. 184, 195, 196.

Wyoming Const. art. 10, §§ 7, 12; Wyoming Stat. tit. 37, chs. 1-3.

APPENDIX D

Principal FCC Decisions Relating to Terminal Equipment and Specialized Common Carriers

Docket No. 16495

Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities, 35 F.C.C. 2d 844 (1972) (Second Report and Order); 37 F.C.C. 2d 184 (1972) (Memorandum Opinion and Order); 38 F.C.C.2d 665 (1972) (Memorandum Opinion and Order).

Docket Nos. 16509-16519

Microwave Communicatons, Inc., 18 F.C.C.2d 953 (1969).

Docket No. 16778

Allocation of Frequencies, 12 F.C.C.2d 841 (1968), *aff'd sub nom. Radio Relay Corp.* v. *FCC,* 409 F.2d 322 (2d Cir. 1969).

Docket No. 16979

Computer Inquiry, 28 F.C.C.2d 267 (1971), *aff'd in part, rev'd in part, sub nom. GTE Service Corp.* v. *FCC,* 474 F.2d 724 (2d Cir. 1973).

Docket No. 16883

Western States Telephone Co. v. *AT&T,* 19 F.C.C. 2d 1068 (1969).

Docket Nos. 16942, 17073

Carterfone, 13 F.C.C.2d 420 (1968) (Decision), 14 F.C.C.2d 571 (1968) (Memorandum Opinion and Order).

Docket No. 18128

AT&T, Revisions of Tariff FCC No. 260 Private Line Services, Series 5000 (TELPAK), 38 P&F Radio Reg. 2d 1121 (1976).

Docket No. 18262

Land Mobile Service, 51 F.C.C.2d 945 (1975), *aff'd sub nom. National Association of Regulatory Utility Commissioners* v. *FCC,* 525 F.2d 630 (D.C. Cir.), *cert. denied,* 96 S. Ct. 2203 (1976).

Docket No. 18652-63

Applications for Construction Permits and Renewal of Licenses for Public Coast Stations in California, 37 F.C.C.2d 12 (1971) (Initial Decision); 37 F.C.C. 2d 1 (1972) (Decision).

Docket No. 18741

Tri-City Telephone Co., Petition for Connection (November 14, 1972) (Recommended Decision).

Docket No. 18875

Licensing of Facilities for Overseas Communications, 30 F.C.C.2d 571 (1971) (Statement of Policy and Guidelines); FCC 76-1069 (November 19, 1976) (Further Statement of Policy and Guidelines).

Docket No. 18920

Specialized Common Carriers, 29 F.C.C.2d 870 (1971), *aff'd sub nom. Washington Utilities & Transportation Commission* v. *FCC,* 513 F.2d 1142 (9th Cir.), *cert. denied,* 423 U.S. 836 (1975).

Docket No. 19129

AT&T, Charges for Interstate Telephone Service, 38 F.C.C.2d 213 (1972) (Phase I Decision and Order); FCC 76D-41 (August 2, 1976) (Phase II Initial Decision).

Docket No. 19309

Preston Trucking Co., 42 F.C.C.2d 245 (1973) (Memorandum Opinion and Order); 44 F.C.C.2d 641 (1973) (Order).

Docket No. 19311

Inquiry into Use of Digital Modulation Techniques, 31 P&F Radio Reg.2d 727 (1974).

Docket No. 19419

AT&T, Revisions of Tariff FCC Nos. 259 and 260 (Data Sets), 33 F.C.C.2d 518 (1972) (Memorandum Opinion and Order); 34 P&F Radio Reg.2d 1604 (1975) (Memorandum Opinion and Order).

Docket No. 19493

Multipoint Distribution Service, 45 F.C.C.2d 616 (1974) (Report and Order); 57 F.C.C.2d 301 (1975) (Memorandum Opinion and Order).

Docket No. 19495

Communication-Satellite Facilities, 40 F.C.C.2d 395 (1973).

Docket No. 19528

Interstate and Foreign MTS and WATS, 56 F.C.C.2d 593 (1975) (First Report and Order); 58 F.C.C.2d 736 (1976) (Second Report and Order); 59 F.C.C.2d 83 (1976) (Memorandum Opinion and Order), *appeal pending sub nom. North Carolina Utilities Commission* v. *FCC,* Nos. 76-1002, -1152, -1292, -1415, -1416, -1443, -1467, -1502 (4th Cir.).

Docket No. 19558

Overseas Dataphone Service, 57 F.C.C.2d 705 (1976).

Docket No. 19691

AT&T, Revisions of Tariff FCC No. 260, Regulations Relating To Protection Equipment On Private Line Service, 39 F.C.C.2d 631 (1973).

Docket No. 19793

Chastain v. *AT&T,* 43 F.C.C.2d 1079 (1973).

Docket No. 19808

Telerent Leasing Corp., 45 F.C.C.2d 204 (1974), *aff'd, North Carolina Utilities Commission* v. *FCC*, 537 F.2d 788 (1976), *cert. denied*, —— U.S. —— (December 13, 1976).

Docket No. 19896

Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers, 46 F.C.C.2d 413 (1974), *aff'd sub nom. Bell Telephone Co. of Pa.* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974).

Docket No. 19919

AT&T, Charges, Regulations, Classifications and Practices for Voice Grade/Private Line Service (High Density-Low Density), 55 F.C.C.2d 224 (1975) (Interim Decision); 58 F.C.C.2d 362 (1976) (Final Decision).

Docket No. 19934

Phone-Mate, Inc. v. *AT&T and South Central Bell Tel. Co.*, FCC 74M-1149 (1974).

Docket No. 19989

AT&T, Revisions of WATS Tariff FCC No. 259, 59 F.C.C.2d 671 (1976).

Docket No. 20003

Economic Implications and Interrelationships Arising from Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations, and Rate Structures, FCC 76-879 (September 23, 1976) (First Report).

Docket No. 20097

Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 F.C.C.2d 261 (1976).

Docket No. 20099

AT&T, Offer of Facilities for Use by Other Common Carriers, 52 F.C.C.2d 727 (1975), *aff'd sub nom. Carpenter* v. *FCC*, 539 F.2d 242 (D.C. Cir. 1976).

Docket No. 20183

New York Telephone Co., Interconnection Facilities Provided to International Record Carriers, 53 F.C.C. 2d 314 (1975).

Docket No. 20199

Joint Petition of CPI Microwave, Inc. and Midwestern Relay Company for an Order to Show Cause, 54 F.C.C.2d 502 (1975).

Docket No. 20201

GTE Satellite Corp. Application to Modify Construction Permits, 57 F.C.C.2d 147 (1975).

Docket No. 20221

CML Satellite Corp., 51 F.C.C.2d 14 (1975).

Docket No. 20288

AT&T, Investigation into the Lawfulness of Tariff FCC No. 267, Offering a DATAPHONE® *Digital Service Among Five Cities*, FCC 76D-34 (July 2, 1976) (Initial Decision).

Docket No. 20452

Interconnection Facilities Provided to International Record Carriers, 52 F.C.C.2d 1014 (1975).

Docket No. 20453

AT&T, Private Line Service Tariff FCC No. 260, 58 F.C.C.2d 1288 (1976).

Docket No. 20476

AT&T, Revision of Tariff FCC No. 263 (Mebane Home Telephone Co. Exemption), 53 F.C.C.2d 473 (1975).

Docket No. 20598

All American Cables and Radio, Inc., Application to Transfer Cayey, Puerto Rico Earth Station, 58 F.C.C.2d 993 (1975) (Memorandum Opinion and Order); 57 F.C.C.2d 950 (1976) (Memorandum Opinion and Order).

Docket No. 20640

MCI Telecommunications Corp., Investigation into the Lawfulness of Tariff FCC No. 1 insofar as It Purports to Offer Execunet Service, 60 F.C.C.2d 25 (1976).

Docket No. 20690

AT&T, Revisions to Tariff F.C.C. Nos. 258 and 267, DATAPHONE® *Digital Service*, 57 F.C.C.2d 956 (1976).

Docket No. 20774

Standard Plugs and Jacks for Connection of Telephone Equipment, FCC 76-617 (June 29, 1976).

Docket No. 20814

AT&T, Revisions of Tariff FCC Nos. 260, 264 and 266, 59 F.C.C.2d 428 (1976).

Docket No. 20828

Amendment of Section 64.702 of the Commission's Rules and Regulations, FCC 76-745 (August 9, 1976) (Notice of Inquiry and Proposed Rulemaking).

Docket No. 20846

Interconnection of Private Land Mobile Radio Systems, FCC 76-603 (June 25, 1976) (Notice of Inquiry).

Decisions in Proceedings Not Having Docket Numbers

AT&T, Applications for Authority to Establish and Operate Channel Groups Between Various Locations in the Continental United States and the State of Hawaii, FCC 76-665 (July 20, 1976).

AT&T, Restrictions on Interconnection of Private Line Services, 60 F.C.C.2d 939 (1976).

AT&T, Revisions of Tariff FCC No. 260, Composite Data Service Vendor Regulation, 60 F.C.C.2d 939 (1976).

AT&T, Revisions to Tariff Nos. 260 and 267 to Provide Additional DATASPEED® *40/4 Equipment*, FCC 76- , FCC News (November 24, 1976).

Bell Telephone Co. of Pa., Application for Construction Permits (October 4, 1976).

MCI Telecommunications Corp., 34 P&F Radio Reg.2d 539 (1975).

MCI Telecommunications Corp., FCC 76-685 (July 30, 1976).

MCI Telecommunications Corp., Revisions to Tariff FCC No. 1, FCC 76-880 (September 28, 1976).

New York Telephone Co., 47 F.C.C.2d 488 (1974), *aff'd, Pocket Phone Broadcast Service, Inc.* v. *FCC*, 538 F.2d 447 (D.C. Cir. 1976).

RCA Global Communications, Inc., 37 F.C.C.2d 1043 (1972), *rev'd sub nom. Hawaiian Telephone Co.* v. *FCC*, 498 F.2d 771 (D.C. Cir. 1974).

Southern Pacific Communications Company Tariff FCC No. 4, FCC 76-881 (September 28, 1976).

United States Transmission Systems, Inc., 48 F.C.C.2d 859 (1974), *aff'd, American Tel. & Tel. Co.* v. *FCC*, 539 F.2d 767 (D.C. Cir. 1976).

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1698

UNITED STATES OF AMERICA, *Plaintiff*,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; AND BELL TELEPHONE LABORATORIES, INC., *Defendants*.

Antitrust Equitable Relief Sought

Filed: November 20, 1974

Complaint

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the defendants named herein, and complains and alleges as follows:

I.

JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted under Section 4 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 4), commonly known as the Sherman Act, in order to prevent and restrain the continuing violations by the defendants, as hereinafter alleged, of Section 2 of the Sherman Act (15 U.S.C. § 2).

2. Defendants American Telephone and Telegraph Company and Western Electric Company, Inc. transact business and are found within the District of Columbia.

II.

THE DEFENDANTS

3. American Telephone and Telegraph Company (hereinafter referred to as "AT&T") is made a defendant herein. AT&T is a corporation organized and existing under the laws of the State of New York, with its principal place of business in New York, New York. AT&T, directly and through subsidiaries, is engaged in providing telecommunications service and in the manufacture of telecommunications equipment.

4. Western Electric Company, Inc. (hereinafter referred to as "Western Electric") is made a defendant herein. Western Electric is a corporation organized and existing under the laws of the State of New York, with its principal place of business in New York, New York. Western Electric is engaged, directly and through subsidiaries, in the manufacture and supply of telecommunications equipment. Western Electric is a wholly-owned subsidiary of AT&T.

5. Bell Telephone Laboratories, Inc. (hereinafter referred to as "Bell Labs") is made a defendant herein. Bell Labs is a corporation organized and existing under the laws of the State of New York, with its principal place of business in Murray Hill, New Jersey. Bell Labs is engaged in telecommunications research, development and design work. Bell Labs is owned jointly by AT&T and Western Electric.

III.

CO-CONSPIRATORS

6. Various other persons, firms and corporations not made defendants herein have participated as co-conspirators with the defendants in the violations hereinafter alleged and have performed acts and made statements in

furtherance thereof. Said co-conspirators include, but are not limited to, the following telephone companies:

Name of Corporation	Percentage of Voting Shares Owned by AT&T	Area Served
New England Telephone & Telegraph Company	85.4	Maine, Massachusetts, New Hampshire, Rhode Island, Vermont
The Southern New England Telephone Company	17.1	Connecticut
New York Telephone Company	100.0	New York, Connecticut
New Jersey Bell Telephone Company	100.0	New Jersey
The Bell Telephone Company of Pennsylvania	100.0	Pennsylvania
The Diamond State Telephone Company	100.0	Delaware
The Chesapeake and Potomac Telephone Company	100.0	Washington, D.C.
The Chesapeake and Potomac Telephone Company of Maryland	100.0	Maryland
The Chesapeake and Potomac Telephone Company of Virginia	100.0	Virginia
The Chesapeake and Potomac Telephone Company of West Virginia	100.0	West Virginia
Southern Bell Telephone and Telegraph Company	100.0	Florida, Georgia, North Carolina, South Carolina

Name of Corporation	Percentage of Voting Shares Owned by AT&T	Area Served
South Central Bell Telephone Company	100.0	Alabama, Kentucky, Louisiana, Mississippi, Tennessee
The Ohio Bell Telephone Company	100.0	Ohio
Cincinnati Bell Inc.	25.7	Ohio, Kentucky, Indiana
Michigan Bell Telephone Company	100.0	Michigan
Indiana Bell Telephone Company, Incorporated	100.0	Indiana
Wisconsin Telephone Company	100.0	Wisconsin
Illinois Bell Telephone Company	100.0	Illinois, Indiana
Northwestern Bell Telephone Company	100.0	Iowa, Minnesota, Nebraska, North Dakota, South Dakota
Southwestern Bell Telephone Company	100.0	Arkansas, Kansas, Missouri, Oklahoma, Texas, Illinois
The Mountain States Telephone and Telegraph Company	87.8	Arizona, Colorado, Idaho, Montana, New Mexico, Utah, Wyoming, Texas
Pacific Northwest Bell Telephone Company	89.2	Oregon, Washington, Idaho
The Pacific Telephone & Telegraph Company	89.7	California, Nevada

IV.

Definitions

7. As used herein:

(a) "Bell Operating Companies" shall mean the companies listed in paragraph 6 above, and their subsidiaries.

(b) "Bell System" shall mean AT&T and the Bell Operating Companies.

(c) "Independent telephone companies" shall mean all telephone operating companies in the United States except the Bell Operating Companies.

V.

Trade and Commerce

8. Telecommunications consists of the electronic and electromagnetic transmission of voice, data and other communications by wire, cable, microwave radio and communications satellite.

9. Telephone communication is the most common form of telecommunications service. Telephone service permits voice telephone communication between subscribers, and includes, among other services, local exchange service for telephone calls between subscribers located within the same local telephone exchange area and long distance or "message toll service" for telephone calls between subscribers located in different exchange areas.

10. Local exchange service is provided by connecting all subscribers in the same local exchange area through one or more central offices. Typically, wire pairs connect each subscriber to telephone company central office switching facilities in that exchange area.

11. Message toll service is provided by connecting central offices in different local exchange areas. The connec-

tion of these local exchange areas, through trunk lines and toll switching offices, permits long distance telephone service throughout the United States. Message toll service typically involves the transmission of telecommunications via microwave radio or coaxial cable between local telephone exchanges, with central office switching equipment in each local exchange area providing each subscriber access to the long distance toll network. The long distance toll network is a nationwide web of trunk lines and toll offices linking all of the telephone operating companies in the United States.

12. Telephone service in the United States is provided by the Bell System and by approximately 1,705 independent telephone companies. Telephone operating companies typically contract with subscribers for local exchange service, connecting the subscriber with the telephone company central office. Subscribers typically are charged installation fees and a monthly charge for service. The telephone companies retain title to the equipment installed, and retain control over the equipment after service is terminated.

13. The Bell Operating Companies provide local telephone service in the 48 contiguous states. As of December 31, 1973, the Bell Operating Companies served approximately 113.2 million telephones, or approximately 82 percent of the nation's telephones. Approximately 1,705 independent telephone companies account for the remaining 18 percent of the nation's telephones. The AT&T's Long Lines Department provides interstate telephone service. For the year ending December 31, 1973, more than 90 percent of all interstate telephone calls in the United States were routed in whole or in part over Bell System facilities. In 1973 the Bell System's total revenue from telephone service was approximately $22 billion. The Bell System is by far the largest supplier of telephone service in the United States.

14. In addition to telephone service, telecommunications includes the transmission of data, facsimile, audio and video programming and other specialized forms of telecommunications. Transmission of these specialized telecommunications may be accomplished over the same nationwide switched network which accommodates telephone service, or over private lines.

15. Private line service involves the leasing of telecommunications circuits to subscribers with a high volume of communications requirements between specific locations. Private lines may be used for the transmission of voice, data, audio and video programming and other specialized forms of telecommunications. Private line service may simply connect two points or may be switched between and among multiple points. A private line may be connected with the switched telephone network.

16. The Bell System provides intercity private line service for the transmission of voice, data, facsimile, audio and video programming and other telecommunications. Private line services are also provided by Specialized Common Carriers, Miscellaneous Common Carriers and Domestic Satellite Carriers. Specialized Common Carriers, Miscellaneous Common Carriers and Domestic Satellite Carriers compete with the Bell System in providing private line service. Total revenue from private line service in 1973 was approximately $1.1 billion. In 1973 Bell System revenue from private line service was approximately $1 billion, or approximately 90 percent of total private line revenue. The Bell System is by far the largest supplier of private line service in the United States.

17. Although many organizations with substantial needs for long distance voice and data telecommunications purchase such services on a private line basis, some organizations construct and maintain private systems for the long distance transmission of voice, data and other telecommunications.

18. Land mobile telecommunications consist of paging, dispatch and mobile telephone service provided by radio communication. These services may be interconnected with the nationwide switched telephone system, permitting communication with telephone subscribers on both a local exchange and a message toll basis. Land mobile telecommunications are provided by Radio Common Carriers, independent telephone companies and the Bell Operating Companies.

19. Telecommunications equipment is used to provide telephone service and other telecommunications, and includes terminal equipment, switching equipment and transmission equipment. Terminal equipment is equipment used principally in telecommunications and installed at the premises of the subscriber. Switching equipment is equipment in local exchange central offices and toll offices used to route and switch telecommunications between subscribers. Transmission equipment is used to transmit telecommunications.

20. Until about 1968, telephone operating companies typically prohibited the interconnection of customer provided terminal equipment with telephone company facilities and, with limited exceptions, provided all the terminal equipment located on subscribers' premises. Telephone operating companies were thus the only significant purchasers of telecommunications terminal equipment.

21. Telephone subscribers and other telecommunications customers may provide their own terminal equipment, and need not rely solely on the offerings of telephone operating companies. Customers may obtain terminal equipment from numerous manufacturers and suppliers, known collectively as the "interconnect industry."

22. Western Electric manufactures and supplies telecommunications equipment for the Bell System and is the largest manufacturer of telecommunications equipment in

the United States. Western Electric's subsidiary, Teletype Corporation, manufactures teletypewriters and data transmission equipment. A substantial majority of the telecommunications transmission, switching and terminal equipment used by the Bell System is supplied by Western Electric. Although Western Electric also sells telecomunications equipment to government agencies, it typically does not sell equipment to independent telephone companies or other users of telecommunications equipment. In 1973, Western Electric's sales to the Bell System were $6.2 billion. Western Electric's total sales in 1973 were $7.0 billion. Western Electric is by far the largest supplier, and the Bell System is by far the largest purchaser, of telecommunications equipment in the United States.

23. AT&T provides services to each Bell Operating Company pursuant to agreements known as "License Contracts." Under these agreements AT&T undertakes to maintain arrangements whereby telephones and related equipment may be manufactured under patents owned or controlled by AT&T and may be purchased by each Operating Company for use within a specified territory; to prosecute research in telephony continuously and to make available to the Operating Company benefits derived therefrom; and to furnish advice and assistance with respect to virtually all phases of the Operating Company's business. The License Contracts, or supplementary agreements in the case of four Operating Companies, provide that AT&T will maintain connections between each licensee's telephone system and the systems of the other Bell Operating Companies, and provide for joint use of certain rights-of-way and facilities. Supplementary agreements cover the sharing of revenues derived by AT&T and the Bell Operating Companies from interstate and foreign services.

24. Western Electric manufactures and supplies equipment to AT&T and each Bell Operating Company pursuant to agreements known as "Standard Supply Contracts."

Under these agreements, as supplemented, Western Electric agrees, upon the order of each Operating Company and to the extent reasonably required for the latter's business, to manufacture materials or to purchase and inspect materials manufactured by others and to sell these materials to the Operating Company. Western Electric also agrees to maintain stocks at distribution points, to prepare equipment specifications, to perform installations of materials and to repair, sell or otherwise dispose of used materials. Under each agreement Western Electric's prices and terms are to be as low as to its most favored customers for like materials and services under comparable conditions.

25. Bell Labs conducts telecommunications research and development for Western Electric and the Bell System. Owned jointly by AT&T and Western Electric, Bell Labs' 1974 budget for telecommunications research and development exceed $500 million. Bell Labs maintains its principal laboratories in Murray Hill, Holmdel and Whippany, New Jersey, and Naperville, Illinois, and additional facilities in seven other states. Bell Labs is by far the largest telecommunications research and development facility in the United States.

26. AT&T, directly and through subsidiaries, regularly transmits voice, data and other telecommunications across state lines to customers located throughout the United States. Western Electric, directly and through subsidiaries, manufactures telecommunications equipment at locations in many states and regularly sells and ships such equipment across state lines to customers located throughout the United States. Bell Labs conducts telecommunications research and development at locations in many states and regularly disseminates the results of such research and development to consumers thereof throughout the United States. AT&T, Western Electric and Bell Labs have been and are engaged in interstate commerce.

VI.

Violations Alleged

27. For many years past and continuing up to and including the date of the filing of this complaint, the defendants and co-conspirators have been engaged in an unlawful combination and conspiracy to monopolize, and the defendants have attempted to monopolize and have monopolized, the aforesaid interstate trade and commerce in telecommunications service, and submarkets thereof, and telecommunications equipment, and submarkets thereof, in violation of Section 2 of the Sherman Act. Defendants are continuing and will continue these violations unless the relief hereinafter prayed for is granted.

28. The aforesaid combination and conspiracy to monopolize has consisted of a continuing agreement and concert of action among the defendants and co-conspirators, the substantial terms of which have been and are:

(a) That AT&T shall achieve and maintain control over the operations and policies of Western Electric, Bell Labs and the Bell Operating Companies;

(b) That the defendants and co-conspirators shall attempt to prevent, restrict and eliminate competition from other telecommunications common carriers;

(c) That the defendants and co-conspirators shall attempt to prevent, restrict and eliminate competition from private telecommunications systems;

(d) That Western Electric shall supply the telecommunications equipment requirements of the Bell System;

(e) That defendants and co-conspirators shall attempt to prevent, restrict and eliminate competition from other manufacturers and suppliers of telecommunications equipment.

29. Pursuant to and in effectuation of the aforesaid combination and conspiracy to monopolize, attempt to monopolize and monopolization, the defendants, among other things, have done the following:

(a) attempted to obstruct and obstructed the interconnection of Specialized Common Carriers with the Bell System;

(b) attempted to obstruct and obstructed the interconnection of Miscellaneous Common Carriers with the Bell System;

(c) attempted to obstruct and obstructed the interconnection of Radio Common Carriers with the Bell System;

(d) attempted to obstruct and obstructed the interconnection of Domestic Satellite Carriers with the Bell System;

(e) attempted to obstruct and obstructed the interconnection of customer provided terminal equipment with the Bell System;

(f) refused to sell terminal equipment to subscribers of Bell System telecommunications service;

(g) caused Western Electric to manufacture substantially all of the telecommunications equipment requirements of the Bell System; and

(h) caused the Bell System to purchase substantially all of its telecommunications equipment requirements from Western Electric.

VII.

Effects

30. The aforesaid violations have had the following effects, among others:

(a) Defendants have achieved and maintained a monopoly of telecommunications service, and submarkets thereof, and telecommunications equipment, and submarkets thereof, in the United States;

(b) Actual and potential competition in telecommunications service, and submarkets thereof, and telecommunications equipment, and submarkets thereof, has been restrained and eliminated;

(c) Purchasers of telecommunications service and telecommunications equipment have been denied the benefits of a free and competitive market.

Prayer

Wherefore, Plaintiff Prays:

1. That the Court adjudge and decree that defendants have combined and conspired to monopolize, have attempted to monopolize and have monopolized interstate trade and commerce in telecommunications service, and submarkets thereof, and telecommunications equipment, and submarkets thereof, in violation of Section 2 of the Sherman Act.

2. That each of the defendants, their officers, directors, agents, employees and all persons, firms or corporations acting on behalf of defendants or any one of them be perpetually enjoined from continuing to carry out, directly or indirectly, the aforesaid combination and conspiracy to monopolize, attempt to monopolize and monopolization of the aforesaid interstate trade and commerce in telecommunications service and equipment, and that they be perpetually enjoined from engaging in or participating in prac-

tices, contracts, agreements or understandings, or claiming any rights thereunder, having the purpose or effect of continuing, reviving or renewing any of the aforesaid violations or any violations similar thereto.

3. That defendant AT&T be required to divest all of its capital stock interest in Western Electric.

4. That defendant Western Electric be required to divest manufacturing and other assets sufficient to insure competition in the manufacture and sale of telecommunications equipment.

5. That defendant AT&T be required, through divestiture of capital stock interests or other assets, to separate some or all of the Long Lines Department of AT&T from some or all of the Bell Operating Companies, as may be necessary to insure competition in telecommunications service and telecommunications equipment.

6. That pursuant to Section 5 of the Sherman Act the Court order summons to be issued to Bell Telephone Laboratories, Inc. commanding it to appear and answer the allegations contained in this Complaint, and to abide and perform such orders and decrees as the Court may make in the premises.

7. That the plaintiff have such other and further relief as the nature of the case may require and as the Court may deem just and proper.

8. That the plaintiff recover the costs of this action.

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Assistant Attorney General

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APPENDIX F

FCC's Analysis of Department of Justice Charges

This addendum lists the 30 alleged actions or practices by the American Telephone & Telegraph Co. on which the Justice Department apparently basis its charges of conspiracy to monopolize. The list is taken from the Department's opening Memorandum of Points and Authorities on jurisdictional issues, pages 9-13. For purposes of the list, which in some cases paraphrases the Department's language, AT&T stands for the defendants collectively.

1. AT&T opposed the establishment of private mobile radio systems, and arbitrarily refused to interconnect [its] local distribution facilities with such systems, thereby preventing access to the telephone network.

2. AT&T opposed the granting of radio frequencies to radio common carriers in an effort to maintain [itself] as the sole provider of mobile radio service to the public in [its] respective areas.

3. AT&T delayed for 12 years before providing the radio common carrier industry interconnection to local telephone exchange facilities.

4. After AT&T reluctantly provided interconnection in 1961, it was permitted only under unreasonably restrictive and discriminatory terms.

5. When a number of firms, including the television networks, attempted to exploit new microwave technology by construction of private microwave communication networks . . ., AT&T began a crash program designed to pre-empt for itself the entire microwave field.

6. When . . . miscellaneous common carriers began providing audio and video transmission for broadcasters, AT&T again employed interconnection restrictions and

other exclusionary measures to limit the competitors' success.

7. AT&T also refused to interconnect its facilities with existing private microwave facilities operated by right-of-way companies (e.g., railroads), thereby limiting the utility of private systems and preserving its virtual monopoly in intercity microwave transmission.

8. Other potential users of private microwave systems sought a portion of the public airwaves for their own use and were again opposed by [AT&T, which] responded with a startling reduction in price which virtually eliminated the incentive for construction and use of private microwave systems.

9. New firms, later to become known as "specialized common carriers," sought over [AT&T's] opposition to enter the intercity private line field in competition with [AT&T which] responded by restricting interconnection with [its] facilities—even though identical interconnection rights were routinely available to . . . AT&T's Long Lines Department.

10. After consuming four years in negotiating contracts covering the local distribution facilities necessary for these new carriers to provide *interstate* service, AT&T broke off negotiations without warning and caused its operating companies to file tariffs with *state* regulatory agencies announcing the terms and conditions under which they would provide the facilities.

11. [AT&T] unreasonably delayed providing intercity communications facilities to the specialized common carriers for several years even though similar facilities were provided to a competing carrier.

12. [AT&T] until 1968 refused to allow interconnection of customer-provided terminal equipment, thereby completely foreclosing competitors' sales of terminal equipment to [AT&T's] subscribers.

13. Since 1969, [AT&T has] allowed interconnection of most terminal equipment manufactured by others only through an "interface device," obtainable only from [AT&T] and for which the subscriber must pay an additional charge.

14. [AT&T has] failed to make these [interface] devices available for certain types of competitive equipment and failed to assure an adequate supply of such devices for other types of competitive equipment. Such devices are often needlessly expensive, often impair the performance of customers' equipment and are often improperly and belatedly installed.

15. [AT&T has] "bundled" charges for terminal equipment and trunk lines, thereby impeding competition.

16. [AT&T has] refused to sell terminal equipment (. . . will only lease equipment), thereby forestalling the development of a secondary market in such equipment and of independent equipment repair and maintenance organizations.

17. [AT&T has] provided certain equipment under termination agreements that impose substantial penalties for early cancellation, thereby insulating such equipment from competition.

18. [AT&T has] pre-announced forthcoming equipment, thereby inhibiting the sale of competitive products.

19. [AT&T has] caused Western Electric to manufacture substantially all of the telecommunicationn equipment requirements of AT&T and the Bell operating companies.

20. AT&T and the Bell operating companies [have purchased] substantially all of their telecommunications equipment requirements from Western Electric.

21. [AT&T has] refrained from purchasing suitable equipment from outside suppliers.

22. [AT&T has] required that the operating companies funnel their outside equipment purchases through Western Electric.

23. [AT&T has] caused Western Electric to copy equipment of other manufacturers for sale to AT&T and the Bell operating companies.

24. [AT&T has] restricted the purchase of competitive equipment until similar equipment was available from Western Electric.

25. [AT&T has] restricted and eliminated the development of alternative local distribution facilities by restricting the use to be made of channels leased to community antenna television ("CATV" or "cable TV") operators and restricting the type of communications permitted on CATV cables attached to [AT&T's] telephone poles.

26. [AT&T has threatened] potential customers of competitors with loss of business from [AT&T] if they purchase from competitors.

27. [AT&T has] refused to sell wiring inside buildings to customers desiring to install their own equipment.

28. [AT&T has] refused interconnection with new independent telephone companies organized to serve new communities.

29. [AT&T has] progressively embraced new telecommunications service and equipment opportunities developed by others.

30. [AT&T has] abused the regulatory process.

APPENDIX G

Bell System Activities Alleged by Government to Be "Beyond the Reach of the Communications Act"

ALLEGED ACTIVITY	FCC PROCEEDING IN WHICH ALLEGATION WAS MADE AND JURISDICTION ASSERTED *FCC Proceeding in Which Allegation Could Have Been Made*
1. "Western Electric has copied competitors' products rather than purchase them for resale to the Bell operating companies;"	Docket 19129: Initial Decision ¶¶ 25, 93, 107 n.26, 381; Trial Staff Ex. 297, pp. 66-67.
2. "Western Electric has . . . repurchased equipment from the Bell companies to refurbish or scrap, thereby preventing the development of a secondary equipment market;"	*Docket 19129: Trial Staff Statement of Aug. 29, 1973, pp. 58-60; Bell Ex. 49A, Tab 6.*
3. "Western Electric has . . . denied or delayed certification of equipment not manufactured by it as 'system standard';"	Docket 19129: Initial Decision ¶¶ 48, 93, 378, 416, pp. 534-35; Trial Staff Proposed Finding D383.
4. "Western Electric has . . . marketed its own equipment to the Bell companies prematurely;"	Docket 19129: Initial Decision ¶¶ 378, 428, 588; Trial Staff Proposed Findings D238-39, D346, D395-96.
5. "Western Electric has . . . marketed its own equipment to the Bell companies . . . at unrealistically low prices;"	Docket 19129: Initial Decision ¶¶ 93, 203-24; Trial Staff Proposed Findings C243, C250, C257.
6. "Western Electris has . . . abused its patent portfolio to obtain access to the technology of others;"	Docket 19129: Initial Decision ¶¶ 107 n.26, 673; Trial Staff Statement of Aug. 29, 1973, pp. 62-64; Bell Ex. 49A, Tab. 8.

7. "Western Electric has . . . made available to the Bell operating companies lists of its suppliers to be used for purposes of reciprocity leverage;"	*Docket 19129: Trial Staff Statement of Aug. 29, 1973, pp. 31-32, 34; Transcript 8385-86; Bell Ex. 44, pp. 112-13. Cf. Docket 16679: Decision ¶¶ 13-17; Docket 16828: Decision ¶¶ 48-57.*
8. "Western Electric has . . . failed to maintain and provide sufficient interface devices to the Bell companies, thus preventing prompt installation of competitors' terminal equipment."	Docket 19419: Order of Feb. 3, 1972; Informal Complaint by Essential Communication Systems, Inc., May 1972, FCC Reference 9310. Cf. Docket 19934: Complaint, Aug. 21, 1973; Docket 19528; Docket 20003.
9. "Bell Laboratories has designed and developed Western's 'fighting machines';"	Docket 19129: Initial Decision ¶¶ 205-206, 61, 378, 381; Trial Staff Ex. 297, pp. 55, 64-66; Trial Staff Proposed Finding C244.
10. "Bell Laboratories has . . . resisted and delayed evaluating non-Western equipment as 'Bell System' standard;"	Docket 19129: Initial Decision ¶¶ 48, 93, 378, 416, pp. 534-35; Trial Staff Ex. 297, p. 50; Trial Staff Proposed Findings C108-109, E53.
11. "Bell Laboratories has . . . conducted economic research to provide theoretical defenses for defendants' structure;"	Docket 19129: Trial Staff Statement of Aug. 29, 1973, pp. 13-15; Initial Decision ¶¶ 15, 152; Bell Ex. 7; Docket 20003: First Supplemental Notice, Att. A, Item G.
12. "Bell Laboratories has . . . failed to provide information about the functioning of the telecommunications network to suppliers who wish to make compatible equipment;"	Docket 19129: Initial Decision ¶¶ 404, 414, 475, p. 535; Trial Staff Proposed Findings D307, D309; ITT Proposed Findings 67-69.

13. "Bell Laboratories has . . . performed cost analyses of Western Electric equipment and AT&T services, developing new theories to support unreasonable low prices for equipment and services subject to competition."	Docket 16258: Order of July 29, 1969, ¶ 9; Docket 18128: Decision ¶¶ 1-10; Docket 19129: Initial Decision ¶ 194; Bell Ex. 7; Docket 20003: First Supplemental Notice, Att. A, Item K; Docket 20288: Initial Decision ¶¶ 137-140.
14. "AT&T and the Bell operating companies have refused to purchase equipment from manufacturers other than Western Electric;"	Docket 19129: Initial Decision ¶¶ 46-48, 93, 106-109, 394-414, pp. 534-35; ITT Proposed Findings 31-41; Trial Staff Proposed Findings D313-25.
15. "AT&T and the Bell operating companies have . . . delayed the purchase of needed equipment until Western could produce it;"	Docket 19129: Initial Decision ¶¶ 93, 298, 318-28; Trial Staff Proposed Findings D100-104.
16. "AT&T and the Bell operating companies have . . . used their control of customer billing information to identify customers susceptible to private line competition;"	Docket 18128: Decision ¶ 207; Docket 19919: Interim Decision ¶¶ 56, 75, 76; Docket 20003: First Supplemental Notice, Att. B, Items I, J, N, O; First Report ¶¶ 271, 272, 282; Docket 20288: Datran Proposed Findings 107-16.
17. "AT&T and the Bell operating companies have . . . strategically announced new service offerings to chill the financing of competitors;"	*Docket 20288: Datran Proposed Findings 143-53.*
18. "AT&T and the Bell operating companies have . . . saturated markets with advertising;"	Docket 19129: Initial Decision ¶¶ 976-85, p. 534; Bell Ex. 4, Tab 21; Docket 20288: Datran Proposed Findings 143-53. Cf. Chief Common Carrier Bureau letter to AT&T dated Jan. 15, 1976; AT&T reply dated Apr. 28, 1976.

19. "AT&T and the Bell operating companies have . . . disparaged competitors;"	Docket 19129: Initial Decision ¶¶ 48, 453, 459-60, 468; Docket 20099: Implementation Meetings, Chief Common Carrier Bureau letter to Westinghouse Electric Corporation dated Oct. 31, 1975.
20. "AT&T and the Bell operating companies have . . . excluded competitors from advertising in the Yellow Pages;"	*Docket 20099: Joint Motion of Participants to RCC discussions; Att. E to Memorandum of Understanding.*
21. "AT&T and the Bell operating companies have . . . agreed with other utility companies to fix rates for cable pole attachments;"	*Dockets 16928, 16943, 17098: Decision ¶¶ 1-3; Dockets 17441, 20029, 20191.*
22. "AT&T and the Bell operating companies have . . . threatened customers or potential customers with loss of Bell business if they patronized competitors."	*Docket 19129: Trial Staff Statement of Aug. 29, 1973, pp. 31-32, 34; Transcript 8385-86; Bell Ex. 44, pp 112-13. Cf. Docket 16679: Decision ¶¶ 13-17; Docket 16828: Decision ¶¶ 48-57.*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976 76-939

No. ...., Misc.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; and BELL TELEPHONE LABORATORIES, INC., *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

MOTION TO ACCELERATE CONSIDERATION AND BRIEF IN SUPPORT OF MOTION TO ACCELERATE CONSIDERATION

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January 6, 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. ...., Misc.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; and BELL TELEPHONE LABORATORIES, INC., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

MOTION TO ACCELERATE CONSIDERATION

Now come petitioners and respectfully move the Court to accelerate consideration of their motion for leave to file a petition for writ of certiorari and of the petition accompanying that motion which seeks issuance under 28 U.S.C. § 1651(a) of a writ of certiorari directly to the United States District Court for the District of Columbia or, in the alternative, issuance under 28 U.S.C. § 1254(1) of a writ of certiorari to the United States Court of Appeals for the District of Columbia before judgment, the object in both cases being to obtain review in this Court of a Memorandum Opinion and Order on Jurisdictional Issues issued by the district court on November 24, 1976, and a subsequent order of that court issued on December 22, 1976,

as soon as is reasonably possible. Specifically, petitioners request the Court: (1) to grant the motion for leave to file a petition for writ of certiorari under 28 U.S.C. § 1651(a); (2) to accept the petition for certiorari as petitioners' brief on the merits of the question presented; (3) to set a date for the Government to file its brief on the merits; and (4) to set this case for argument as soon as is reasonably possible in this Term of Court. In support of this motion, petitioners submit herewith their Brief in Support of Motion to Accelerate Consideration.

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January 6, 1977

IN THE

Supreme Court of the United States

October Term, 1976

No. ...., Misc.

American Telephone and Telegraph Company; Western Electric Company, Inc.; and Bell Telephone Laboratories, Inc., *Petitioners*,

v.

United States of America, *Respondent*.

BRIEF IN SUPPORT OF MOTION TO ACCELERATE CONSIDERATION

STATEMENT

This case involves a civil antitrust complaint brought by the Antitrust Division of the Department of Justice acting on behalf of the United States against three of the companies that comprise what is commonly known as the Bell System, an integrated enterprise that provides most of the telecommunications common carrier service throughout the continental United States. The basic charges set forth in the Government's complaint are that the Bell System has monopolized, and attempted and conspired to monopolize, alleged telecommunications service and equipment markets.

Although the markets involved are not precisely identified in the complaint, it is clear that the Government's charges are directed exclusively at areas in

which, and services and equipment with respect to the provision of which, the Bell System operates solely as a common carrier enterprise. Moreover, the specific charges made in the complaint and identified by the Government in the proceedings before the district court as the grounds for its basic monopolization charges all relate to the Bell System's common carrier activities.

In light of the nature of the charges involved, petitioners challenged the jurisdiction of the district court over the Government's complaint, pointing out that the matters encompassed therein are subject to pervasive regulation by both federal and state regulatory agencies, that the public interest standard of this pervasive regulatory scheme is fundamentally different from and inconsistent with the unidimensional standard of competition embodied in the antitrust laws, that the regulatory jurisdiction and responsibility thus established has been and is being vigorously exercised with respect to the very matters alleged in the complaint, and that under this Court's decisions in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973), and *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975), the antitrust jurisdiction of the federal courts does not extend to matters subject to pervasive regulation under a standard inconsistent with the competition standard of the antitrust laws.

The district court rejected this challenge to its jurisdiction. On the authority of this Court's decisions in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), and *United States* v *Radio Corp. of America*, 358 U.S. 334 (1959), the court held that even a pervasive scheme of regulation "does not automatically necessitate the conclusion that the antitrust laws are

to be displaced." (Petition, App. A, p. 7a). The court conceded that the decision in the *NASD* case makes it clear that "a regulatory scheme may be so pervasive that it must displace the antitrust laws" (*id.*). However, apparently on the theory that regulation of telecommunications common carriers is somehow less pervasive than the regulation of securities dealers involved in the *NASD* case, the court refused to apply that principle to this case.

In petitioners' judgment, the decision of the district court is demonstrably erroneous. The decisions of this Court in *Otter Tail Power* and *Radio Corporation of America* were premised on the fact that pervasive common carrier regulation did *not* exist with respect to the industries and activities involved in those cases. Indeed, the entire thrust and reasoning of the Court's opinions was that had the activities involved in those cases been subject to such regulation, the antitrust laws would not have been applicable under the principle of *Pan American*, *Hughes* and *NASD*. Since the Bell System's telecommunications common carrier activities are subject to pervasive common carrier regulation, that principle is plainly applicable here, for, contrary to the implication of the district court in distinguishing *NASD*, telecommunications common carrier activities are *more* pervasively regulated than any of the activities involved in any of the cases that have previously come before this Court. In fact, an analysis of the major regulatory statutes demonstrates that Title II of the Communications Act, together with comparable state statutes preserved in and made a part of federal policy thereby, establishes the most pervasive regulatory scheme applicable to any industry in the country. (These considerations are summarized in the petition, at pp. 34-37.)

While it was considering the issue of its jurisdiction, the district court had stayed all discovery in this case on its own motion in recognition of the fact that such "threshold matters . . . should be resolved before the expensive and protracted discovery inherent in the nature of this case was undertaken by the parties" (Petition, App. A, p. 2a). That stay has now been lifted, however, and the parties are about to commence what is virtually certain to be at least a ten-year period of discovery and trial. The burdens of discovery and trial in this case would be staggering; petitioners initially received document requests from the Government which would require the production of some *1.2 billion* pages of material at an estimated cost to petitioners *in excess of $300 million*. Moreover, the pendency of this case during the many years certain to be required to prepare and try it would seriously impair the ability of petitioners to carry out their responsibilities under the regulatory scheme to which they are subject. In addition, there are now pending against the Bell System companies more than thirty other antitrust actions in seven different judicial circuits around the country. Each of these cases involves one or more of the same charges that have been made by the Government in this case and therefore involves the same jurisdictional question that is presented here. (These considerations are discussed more fully in the petition, pp. 26-31.)

For all these reasons, it is imperative that a definitive review and resolution of the district court's assertion of jurisdiction be obtained as soon as possible. Because of the provisions of Section 2 of the Expediting Act (15 U.S.C. § 29), which are applicable to civil antitrust cases brought by the Government, an interlocutory appeal cannot be taken from the district court's decision. However, this Court has jurisdiction under

the All Writs Act (28 U.S.C. § 1651(a)), to review that decision in aid of its ultimate appellate jurisdiction. *United States Alkali Export Association, Inc.* v. *United States*, 325 U.S. 196 (1945); *Far East Conference* v. *United States*, 342 U.S. 570 (1952). See also *Ex parte Peru*, 318 U.S. 578 (1943).

There is a possibility, in view of certain 1974 amendments to the Expediting Act, that the Court of Appeals for the District of Columbia also has jurisdiction under the All Writs Act to review the district court's decision. See *Kaufman* v. *Edelstein*, 1976-1 Trade Cases ¶ 60,841 at 68,668 (2d Cir. 1976). However, given the lengthy delay that has already been experienced in this case while the district court considered the question of its jurisdiction, coupled with the basic policy of the Expediting Act itself that Government civil antitrust cases should proceed as expeditiously as possible, the interests of sound judicial administration would best be served by direct review in this Court. The importance of this particular litigation, the wholly legal character of the jurisdictional question presented here, and the need for a definitive resolution of that question all lead inexorably to the conclusion that the question ultimately must be resolved by this Court. That being so, petitioners submit that such a definitive resolution of the question ought to be made as soon as possible.

For that reason, petitioners have filed a petition for writ of certiorari under the All Writs Act directly in this Court. Petitioners have also filed a petition for writ of certiorari in the Court of Appeals for the District of Columbia but, with respect to that petition, petitioners have asked in the petition filed in this Court that the Court grant certiorari before judgment in the court of appeals. Under 28 U.S.C. § 1254(1), this Court has jurisdiction to review cases filed in the

court of appeals under 28 U.S.C. § 1651(a), *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964), and the provisions of the section expressly permit such review before judgment. See *United States* v. *Nixon*, 418 U.S. 683 (1974); *New Haven Inclusion Cases*, 399 U.S. 392 (1970). By this approach, petitioners have presented this Court with alternative procedures under either of which it unquestionably has the power directly to review the district court's decision.

This motion to accelerate consideration is designed to facilitate even greater expedition in the handling of the question sought to be presented here. By this motion, petitioners ask the Court to grant the motion for leave to file the petition for writ of certiorari, to accept the petition as petitioners' brief on the merits, to establish a date on which the Government should file its brief and to set this case for argument as soon as is reasonably possible. For the reasons to be set out below, this Court should grant petitioners' motion to accelerate consideration.

ARGUMENT

The procedure urged by petitioners in this motion has a single purpose—that is, to permit consideration and resolution of the question presented by the petition for writ of certiorari in this case during this Term of Court. Plainly, such a procedure is in the best interests of the parties, since prompt resolution of the question presented would avoid the enormous burdens of a possibly unnecessary discovery and trial in the case. It is in the best interests of the non-parties who inevitably will be drawn into this case by subpoenas and upon whom substantial burdens would therefore also necessarily be imposed. It is in the best interests of the public, which, because the Bell System is a regulated public utility enterprise, will ultimately bear the

expenses of both sides of this litigation. It is in the best interests of the courts, the time and resources of which are being spent on this and related cases pending against the Bell System, even though no one can know whether those cases belong in the courts at all, unless and until there is a definitive resolution of the question of the applicability of the antitrust laws to the pervasively regulated common carrier activities of the Bell System. And finally, it is in the best interests of the regulatory agencies charged with the responsibility of regulating telecommunications common carriers, both state and federal. Those agencies need and are entitled to know—as promptly as possible in light of the fact that proceedings are currently pending before them involving the very matters sought to be litigated in this case—the relationship between their regulatory responsibilities and the jurisdiction of the antitrust courts and, even more importantly, the relationship between the public interest standard they administer and the competition standard embodied in the antitrust laws.

Petitioners submit that the procedure suggested by this motion is entirely justified and appropriate in this extraordinary case. In light of the multiplicity of similar suits now pending, the burden upon judicial resources from the continued discovery and trial procedures in those suits, the staggering burden of discovery in this case alone which is scheduled to commence March 1, 1977, and the uncertainty that exists and will continue to exist with respect to petitioners' regulatory obligations in light of the district court's opinion, the need for a prompt and definitive resolution of the question presented by this petition is clear.

This Court has on numerous occasions accelerated consideration of matters pending before it where it believed the circumstances involved to require or justify

such action. Indeed, in the *Penn-Central Merger and N&W Inclusion Cases,* 389 U.S. 946, 947 (1967) the Court adopted essentially the identical procedure suggested here.

The need for accelerated consideration is far more imperative in the present case, from the standpoint of the parties, the public, the courts, and the regulatory agencies involved. The procedure suggested by petitioners will satisfy that need, and it will do so in a manner that is manifestly appropriate in light of the background of this case. The parties have briefed the jurisdictional question presented in the petition thoroughly for the district court on *four separate occasions* within the past two years. The procedure suggested here could not therefore possibly be considered either a burden to the Government or a hindrance of its ability fully to present its position to the Court.

CONCLUSION

The Motion to Accelerate Consideration should be granted.

Respectfully submitted,

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January 6, 1977

No. 76-939

In the Supreme Court of the United States

October Term, 1976

American Telephone and Telegraph Company;
Western Electric Company, Inc.; and
Bell Telephone Laboratories, Inc.,
petitioners

v.

United States of America

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION TO ACCELERATE CONSIDERATION AND TO MOTION FOR LEAVE TO FILE A PETITION FOR WRIT OF CERTIORARI UNDER 28 U.S.C. 1651(a)

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No. 76-939

AMERICAN TELEPHONE AND TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INC.; AND
BELL TELEPHONE LABORATORIES, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION TO ACCELERATE CONSIDERATION AND TO MOTION FOR LEAVE TO FILE A PETITION FOR WRIT OF CERTIORARI UNDER 28 U.S.C. 1651(a)

STATEMENT

In pre-trial orders dated November 24 and December 22, 1976, the district court held that it had antitrust jurisdiction "of at least some of the aspects of" a civil action filed by the United States on November 20, 1974, charging petitioners with violating Section 2 of the Sherman Antitrust Act, 15 U.S.C. 2.[1] Petitioners have filed, pursuant to 28 U.S.C.

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[1]The district court also noted, in so holding, that as a preliminary matter "some—or much—of the conduct and practices of defendants upon which plaintiff bases its charges of conspiracy to monopolize, attempts to monopolize and monopolization might well be subject to the doctrine of primary jurisdiction" and, if so, would be referred at the appropriate time to the Federal Communications Commission. Pet. App. 8a, 10a.

1651(a), an application in this Court for a common law writ of certiorari to the United States District Court for the District of Columbia, seeking interlocutory review of those two pre-trial orders. Petitioners simultaneously have sought review of the district court's orders by filing, also pursuant to 28 U.S.C. 1651(a), a petition for certiorari in the United States Court of Appeals for the District of Columbia Circuit. The court of appeals has not yet issued any order in response to that petition. Based upon the pending application for an extraordinary writ in the court of appeals, petitioners alternatively have asked this Court, under 28 U.S.C. 1254(1) and Rule 20 of this Court's Rules, for a statutory writ of certiorari before judgment in the court of appeals.

In connection with their petition to this Court, petitioners have filed two motions: (i) a motion for leave to file a petition for an extraordinary writ, and (ii) a motion to accelerate consideration of their petition for a writ of certiorari. The United States opposes both motions and urges this Court to deny them forthwith.

The government's complaint in this case (Pet. App. 50a) charges petitioners—American Telephone and Telegraph Company, Western Electric Company, Inc., and Bell Telephone Laboratories, Inc.—with attempting and conspiring to monopolize, and monopolizing, interstate trade and commerce in the two broad markets of telecommunications service and telecommunications equipment and in several included submarkets. The complaint seeks a declaratory judgment that defendants have violated Section 2 of the Sherman Act, 15 U.S.C. 2, and seeks various forms of equitable relief, including an order requiring divestiture by AT&T of such research, manufacturing, and service components as may be found necessary to insure competition in the telecommunications service and equipment markets and sub-markets (Pet. App. 63a).

The district court on February 20, 1975, *sua sponte*, stayed discovery in order to consider and determine certain threshold jurisdictional issues. Extensive briefing by the parties was followed by a hearing on July 23, 1975. Thereafter, at the court's request, the Federal Communications Commission submitted a brief *amicus curiae* setting forth its views on the jurisdictional issues.[2] The parties filed memoranda responding to the FCC's brief. Subsequently, the court ordered a further hearing and requested the parties and the FCC to brief the question whether Congress, by enacting the Federal Communications Act of 1934, 47 U.S.C. 151 *et seq.*, intended by implication to provide the defendants with complete immunity from antitrust prosecution with respect to their communications activities (Pet. App. 2a-3a).

Petitioners contended below, and contend in this Court, that even though Congress did not provide the FCC with broad explicit antitrust exemption authority, it nevertheless intended to exempt their communications activities from the antitrust laws by reason of the "pervasive scheme" of federal and state regulation. In general, the United States and the FCC took the position that the Congress which had provided the Commission with explicit, narrow, antitrust exemption authority, 47 U.S.C. 221(a), 222(c)(1), evidenced no intent to confer such broad antitrust immunity upon the various activities of AT&T and its subsidiaries. Both the United States and the FCC stated that antitrust and regulatory policies were complementary rather than irreconcilable. Similarly, both the United States and the FCC recognized that in view of the special regulated characteristics of the industry the authority to make certain specific and discrete determinations was conferred by

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[2]A copy of the *amicus* brief filed with the district court by the Commission has been lodged with the Clerk of this Court.

Congress upon the FCC, and that an antitrust court might accordingly be required to submit certain questions to the FCC for its preliminary consideration.

The district court, on November 24, 1976, concluded "that the Communications Act does not expressly, or impliedly, repeal the antitrust laws. Neither the language nor the legislative history of the Communications Act supports the conclusion that Congress intended by that Act to grant a total, blanket immunity to defendants from application of antitrust laws, and to place exclusive jurisdiction over all their conduct in the Federal Communications Commission" (Pet. App. 8a). The court noted, however, that "when certain basic communication issues arise in antitrust proceedings, the regulatory scheme prescribed in Title II of the Communications Act for common carriers would seemingly make referral to the Federal Communications Commission imperative" (Pet. App. 10a). Thus, the court concluded that it had antitrust jurisdiction over "at least some of the aspects of" the complaint and allowed discovery in this action to continue. On December 22, 1976, the court issued an order denying petitioners' motion to dismiss the complaint for lack of jurisdiction (Pet. App. 12a).

ARGUMENT

Petitioners' motion for accelerated consideration and their motion for leave to file a petition for an extraordinary writ should be denied.

1. This is not a case in which extraordinary review under 28 U.S.C. 1651(a) is warranted. Such extraordinary review, in conflict with the long-standing policy against interlocutory review in the federal courts, requires more than an issue "of general importance" involving "the orderly administration of justice" (Pet. 24). Petitioners have not demonstrated that this case presents a "really extraordinary cause" requiring an extraordinary remedy. *Ex parte Fahey*, 332 U.S. 258, 260. Ultimately, the only reasons given

by petitioner to justify the review sought are the importance of the question presented and the unusual size and potential expense of the trial of this case (Motion to Accelerate 6-7).[3] This Court has consistently declined to treat the cost of trial as a reason for granting an extraordinary writ. *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 30; see *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110. Nor does the importance of the legal question alone ordinarily justify use of an extraordinary writ. The trial court must be guilty of a usurpation of power, something far more egregious than merely an allegedly erroneous decision on a question of jurisdiction. *Kerr* v. *United States District Court for the Northern District of California*, No. 74-1023, decided June 14, 1976; *Roche, supra*, 319 U.S. at 27; *Will* v. *United States*, 389 U.S. 90, 95-96. Where this Court has reviewed jurisdictional questions, the lower court decision has put it into conflict with a federal agency, *Far East Conference* v. *United States*, 342 U.S. 570, or threatened defendants with severe sanctions where it was alleged that Congress intended to provide them with a means for correcting wrongs and avoiding all legal liability, *United States Alkali Export Association* v. *United States*, 325 U.S. 196, 203-204.[4] There is no such conflict with another federal agency here, since both the FCC and the United States agree that the district court has jurisdiction over substantial parts of the

[3]The United States believes that, while the litigation of this case will be lengthy, petitioners' estimate of the amount and expense of the discovery that ultimately will occur is vastly excessive. As discovery progresses procedures can be, and to some extent already have been, developed to expedite and curtail the need for such an extremely broad document search (Pet. 20, n. 20). Moreover, the United States already has agreed to conduct its file search in a manner which relieves petitioners of much of the expense of traditional discovery.

[4]Petitioners there claimed the district court's exercise of jurisdiction denied them the "opportunity, with the expert aid of the Trade Commission, to retrace their steps, without being subjected to the penalties of the law." 325 U.S. at 203.

complaint and that during the course of the litigation certain issues may be referred to the Commission for its consideration.[5] Nor does the exercise of jurisdiction deny petitioners some special sanctuary, since they concede the Commssion has jurisdiction over much of the conduct which is the subject of this complaint (Pet. 47-48).

Moreover, review of the present jurisdictional question would be unlikely to resolve the entire question of jurisdiction, and would instead open the door to repeated interruption of orderly trial procedures for additional interlocutory review of subsequent jurisdictional questions. All the district court decided here is that it has jurisdiction over at least some of the complaint. Affirmance of that order would not avoid specific questions regarding antitrust court jurisdiction over particular acts and practices subject to or related to FCC regulation. Conversely, reversal of the district court's limited order would be inappropriate. Substantial parts of the complaint involve activity not subject to the FCC's direct control under Title II of the Communications Act, the common carrier provisions upon which petitioners principally rely in asserting antitrust immunity. The remaining alternative presently available to this Court is an anticipatory resolution, issue by issue, of individual jurisdictional claims, involving an extremely subtle interplay of facts and statutes, where the parties have not yet had a chance to flesh out the exact dimensions of the

[5]Although the Court has not always deferred to an agency's judgment on the merits of an antitrust court's jurisdictional claims, *e.g., Hughes Tool Co.* v. *T.W.A.*, 409 U.S. 363, the problem is decidedly different where the question is issuance of an extraordinary writ to resolve a jurisdictional claim. The agency's concurrence strongly suggests that the court's assertion of jurisdiction is not a usurpation of power, thus rebutting any claim of "clear and indisputable" right to the writ. *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 384, quoted with approval in *Kerr, supra*, slip op., p. 9. In any event, where agency and court agree, there is no conflict which requires immediate resolution by a higher authority.

dispute. The impropriety of such an approach highlights the lack of justification for interlocutory review of what is, after all, a preliminary jurisdictional determination.

Granting the requested extraordinary writ in the present circumstances would also be inconsistent with Congress' desire to limit piece-meal review in government civil antitrust cases. For many years Congress effectuated that goal by limiting appellate review of such cases to this Court. The Expediting Act, prior to recent amendment, deprived the courts of appeals of both appeal and extraordinary writ jurisdiction. *Tidewater Oil Co.* v. *United States*, 409 U.S. 151. While amendment of the Expediting Act in 1974, 88 Stat. 1706, 1709, 15 U.S.C. (Supp. V) 29, conferred jurisdiction upon the courts of appeals over final judgments in government civil antitrust cases, their appeal jurisdiction over interlocutory orders was limited to orders granting or denying injunctive relief. The legislative history of the 1974 amendments makes it clear that the restrictions on the appellate courts' interlocutory appeal jurisdiction were designed to avoid piece-meal review of government civil antitrust litigation. S. Rep. No. 93-298, 93d Cong., 1st Sess. 4 (1973) *Kaufman* v. *Edelstein*, 539 F. 2d 811, 815-816 (C.A. 2). Due respect for Congress' will, therefore, would require a conservative use of extraordinary writs by this Court in dealing with government civil antitrust cases.

2. Under Rule 31(2) of the Rules of this Court, a petition for an extraordinary writ "shall set forth with particularity why the relief sought is not available in any other court, or cannot be had through other appellate processes." The identical relief sought by petitioners in this Court is available by petition for an extraordinary writ in the United States Court of Appeals for the District of Columbia Circuit. Indeed, as indicated above, petitioners have pending an application for such a writ in that court. Because of the circumstances of this case previously discussed, there is

no reason to by-pass the court of appeals, especially when that court is particularly experienced with administrative law issues generally, and with communications law issues, particularly.[6]

Petitioners have not demonstrated that this case, in its present posture, presents any issue "peculiarly appropriate" for action by this Court. *Ex parte United States*, 287 U.S. 241, 249. Cf. *Bucolo* v. *Adkins*, 424 U.S. 641, 643. On the contrary, initial resort to the court of appeals would seem more consonant with the purposes of the 1974 Expediting Act Amendments. By that legislation, adopted in part in response to suggestions by members of this Court,[7] Congress conferred upon the courts of appeals jurisdiction in government civil antitrust cases with respect to final judgments, interlocutory orders granting or denying an injunction, and extraordinary writs. *Kaufman* v. *Edelstein*, *supra*. Since Congress acted in order to relieve the burden on this Court, it would be incongruous for the Court to bypass the court of appeals in the absence of compelling need, a factor which is not present here.

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[6]In *United States Alkali Export Association* v. *United States*, *supra*, upon which petitioners primarily rely, this Court granted a common law writ of certiorari to review an order of the district court only because *no* other relief was available. This Court noted that its rule is to decline to issue extraordinary writs prior to review in a court of appeals, either by ordinary appeal or extraordinary remedy, but "where, as here, sole appellate jurisdiction lies in this Court, application for a common law writ in aid of appellate jurisdiction must be to this Court." 325 U.S. 202. The same situation prevailed in all civil antitrust cases brought by the United States prior to the amendment, in 1974, of the Expediting Act, 88 Stat. 1706, 1709, 15 U.S.C. (Supp. V) 29. See *Far East Conference* v. *United States*, 342 U.S. 570; *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212.

[7]S. Rep. No. 93-298, 93d Cong., 1st Sess. (1973), accompanying S.782, the 1974 Antitrust Laws Amendments, notes on page 8 that. "One of the principal arguments offered in support of the proposal is to relieve the Supreme Court of the burden of hearing the numerous cases coming to it under the Expediting Act. * * * Almost all the present Justices have, both in and out of Court, asked that these cases go first to the court of appeals."

Petitioners' complaint here goes not to the expense and delay of appellate review, but to the costs of discovery and litigation over what they predict will be a ten-year period (Pet. 26). Petitioners' goal is to obtain a decision from this Court by the end of this Term (Motion to Accelerate 6). In this context, allowing the case to follow the normal appellate course would not add significant delay. There is no reason to believe that the court of appeals would be indifferent to petitioners' request for expeditious consideration of their petition. Cf. *Aaron* v. *Cooper*, 357 U.S. 566, 567. If that court summarily denies the petition, petitioners may seek certiorari before this Court without delay. If the court of appeals should rule on the merits of the petition, it can be expected to rule in an expeditious manner so that this Court could, if it so chooses, hear the case early next Term.

3. The same reasons lead to the conclusion that this Court should not take the extraordinary step of granting certiorari before judgment in the court of appeals under 28 U.S.C. 1254(1). Rule 20 of the Rules of this Court provides that this Court will issue a writ of certiorari to review a case before judgment in the court of appeals only upon a showing that the "case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." This Court has, in the past, granted common law or statutory certiorari before judgment only in cases involving: (i) issues similar to those already pending before the Court, *Bolling* v. *Sharpe*, 344 U.S. 873, (ii) relations with foreign powers, *Ex parte Peru*, 318 U.S. 578,[8] (iii) extreme national emergency,

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[8]In *Ex parte Peru*, this Court granted a motion for leave to file a petition for a writ of prohibition or mandamus directly to the district court. In so doing, it effectively applied the standard contained in Rule 20. This Court explained that "the case is one of such public importance and exceptional character as to call for the exercise of our discretion to issue the writ rather than to relegate the Republic of Peru to the circuit

Youngstown Co. v. *Sawyer*, 343 U.S. 579, and (iv) the potential for a constitutional crisis and confrontation extending beyond the bounds of the particular litigation, *United States* v. *Nixon*, 418 U.S. 683. As indicated above, petitioners have demonstrated no exceptional political, economic, or social significance pertaining to this case which would require immediate resolution by this Court.

4. Petitioners' motion for accelerated consideration of their alternative petitions for a writ of certiorari would, if granted, effectively amount to granting certiorari. We have set forth various reasons, unrelated to the substantive merits of petitioners' exclusive jurisdiction argument, why we believe that this Court should deny petitioners' motions.[9]

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court of appeals * * *. The case involves the dignity and rights of a friendly sovereign state, claims against which are normally presented and settled in the course of the conduct of foreign affairs by the President and by the Department of State." 318 U.S. at 586-587.

[9]It may be appropriate for this Court to dismiss the petition for a statutory writ of certiorari before judgment on the ground that it has no jurisdiction to consider the petition pursuant to 28 U.S.C. 1254. *King Bridge Co.* v. *Otoe County*, 120 U.S. 225, 226 (and cases cited). The current case is not "in" the court of appeals for purposes of invoking this Court's jurisdiction under 28 U.S.C. 1254 merely by virtue of the filing of a petition for a discretionary writ. *House* v. *Mayo*, 324 U.S. 42, 44. Unlike the filing of a notice of appeal, the filing of a petition for a discretionary writ does not immediately remove a case from the jurisdiction of the district court to that of the court of appeals.

In *Schlagenhauf* v. *Holder*, 379 U.S. 104, the decision relied upon by petitioners for a contrary interpretation of 28 U.S.C. 1254, this Court granted certiorari only after the court of appeals had considered in depth and issued a decision (one judge dissenting) with respect to a petition for a writ of mandamus. The issue of whether this Court had jurisdiction under 28 U.S.C. 1254(1) to review that decision was not in dispute and was not adjudicated by this Court. 379 U.S. at 109. Moreover, this Court's decision notes that the court of appeals reached the merits of the underlying dispute and decided the issue adversely to petitioner. 379 U.S. at 111. In those circumstances, the parties agreed that the case was "in" the court of appeals. Cf. *Thermatron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336.

We are filing this memorandum in opposition to those motions in order to inform the Court of the views of the United States as to the wisdom of the course of action which petitioners propose and to indicate to this Court that the United States does not acquiesce therein. We believe that a discussion of the substantive merits of petitioners' exclusive jurisdiction claims is not necessary to the proper disposition of the issues posed by petitioners' motions.

However, it is the intention of the United States to oppose the petitions for certiorari, in a brief in opposition to be filed at a subsequent date,[10] with respect to the substantive issue of whether this case falls within the FCC's exclusive jurisdiction.

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[10]A brief in opposition would, of course, be unnecessary if in the interim this Court dismisses petitioners' petition for a statutory writ of certiorari and denies petitioners' motion for leave to file a petition for extraordinary relief. Under Rule 24 of this Court's Rules, the brief in opposition of the United States is currently due on or before February 26, 1977.

CONCLUSION

This Court should deny petitioners' motions for accelerated consideration and for leave to file the petition for extraordinary relief.

Respectfully submitted.

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January 1977.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-939, Misc.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; and BELL TELEPHONE LABORATORIES, INC., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITIONERS' REPLY TO OPPOSITION OF THE UNITED STATES TO MOTION TO ACCELERATE CONSIDERATION AND TO MOTION FOR LEAVE TO FILE A PETITION FOR WRIT OF CERTIORARI UNDER 28 U.S.C. 1651(a)

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PRELIMINARY STATEMENT

The Government has fundamentally distorted the question which petitioners seek to present to this Court and has simply ignored many of the reasons set forth in the petition for certiorari which justify immediate review of that question by this Court.

The question presented by the petition relates to whether a pervasively regulated *common carrier* enterprise is subject to the antitrust laws with respect to its *common carrier* activities (Petition, p. 4). Yet

the Government in its opposition never acknowledges or in any way attempts to deal with this question. Indeed, the phrase "common carrier" is used only once in the entire opposition, and then only in connection with a description of the provisions of Title II of the Communications Act and without any recognition of the fact that the Complaint in this case involves precisely the activities pervasively regulated by those common carrier provisions (Opposition, p. 7).[1]

This omission is critical. As pointed out in the petition (pp. 53-63), this Court has announced, applied and repeatedly reiterated the principle that activities subject to pervasive common carrier regulation may not be made the subject of antitrust liability. *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296 (1963); *Hughes Tool Co.* v. *Trans World Airlines, Inc.,* 409 U.S. 363 (1973); *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 373-74 (1973); *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 352 (1963);

[1] In this reference, the Government does suggest that parts of the complaint "involve activity not subject to the FCC's *direct* control" (Opposition, p. 7) (emphasis supplied), apparently referring to those charges discussed at pp. 101-106 of the petition. As is there pointed out, however, the regulatory agencies do have, and have asserted, effective control over matters of this kind. In these circumstances, the assertion of such charges does not confer antitrust jurisdiction. *United States* v. *National Ass'n of Securities Dealers, Inc.,* 422 U.S. 694, 733-34 (1975); *United States Navigation Co.* v. *Cunard Steamship Co.,* 284 U.S. 474 (1932). Certainly, the inclusion of such charges does not justify the broad Complaint involved here; hence, at the very least, the Complaint in this case should have been dismissed without prejudice to the filing of an amended complaint limited to the claims found to be outside the jurisdiction of regulatory agencies. See *Seatrain Lines, Inc.* v. *Pennsylvania R.R. Co.,* 207 F.2d 255 (3d Cir.), *cert. denied,* 345 U.S. 916 (1953).

United States v. *Radio Corp. of America,* 358 U.S. 334, 348-49 (1959). See also *California* v. *FPC,* 369 U.S. 482, 485 (1962). The Government does not discuss these cases, preferring instead to relegate them to its reply on the merits of the petition (Opposition, p. 12), the obviation of a need for which is the whole purpose of the Government's opposition (*id.* at n.10). The Government's apparent strategy is to downplay, to the fullest extent possible, the plain conflict between the decision below and this Court's previous decisions and thus to permit this case to continue indefinitely on this erroneous basis, apparently to take advantage of the possibility that when and if the case comes back for review after trial, the Court would be reluctant to overturn and render useless the efforts of many years of litigation as occurred in the *Hughes* case.

The Government's treatment of the reasons for granting the extraordinary writ sought here is similarly disingenuous. Thus, the opposition categorically asserts that "the only reasons given by petitioner to justify the review sought are the importance of the question presented and the unusual size and potential expense of the trial of this case" (Opposition, p. 5). However, the reasons actually relied upon by petitioners for granting the writ are discussed at length in the petition (pp. 23-106). These reasons include: (1) the fact that this case involves a question of general importance going to the very jurisdiction of the district court, the proper resolution of which would dispose completely of this litigation (Petition, pp. 29-30, 32-33); (2) the fact that the decision below purporting to resolve this question is demonstrably in conflict with the prior decisions of this Court (Petition, pp. 53-71); (3) the fact that the mere pendency of this litigation

would frustrate the policies of Congress reflected in the Communications Act and policies of state legislative bodies reflected in comparable state regulatory statutes (Petition, pp. 27-29); (4) the fact that this litigation would impose both upon parties and upon numerous non-parties that necessarily would become involved, unique burdens beyond any ever encountered in any civil litigation in this country (Petition, pp. 17-21, 26-27); (5) the fact that the discovery and trial in this and some thirty other cases now pending against the Bell System involving the same fundamental jurisdictional question would impose substantial burdens upon the judicial system (Petition, pp. 29-31).

Again, the Government's failure even to acknowledge four of the reasons expressly set forth as a part of the justification for the grant of an extraordinary writ in this case and its bland characterization of the remaining two reasons can only have been designed to achieve some litigating advantage. The decisions of this Court establish that review by certiorari under the All Writs Act is appropriate where, as in the present case, the question presented goes to the jurisdiction of a district court to entertain an antitrust complaint with respect to matters subject to regulation by a federal agency; where, as here, review by appeal is foreclosed by the Expediting Act; and where, as here, a failure to review the decision below prior to final judgment would result in serious hardship from protracted and potentially unnecessary litigation and in frustration of the congressional policy embodied in the regulatory scheme. *United States Alkali Export Association, Inc.* v. *United States*, 325 U.S. 196 (1945); *Far East Conference* v. *United States*, 342 U.S. 570 (1952).

In these circumstances, the Government's opposition can only be regarded as designed to serve its tactical litigating interests essentially without regard to the large public interest considerations that are apparent on the face of the petition. When considered in this light, petitioners submit that the Court should reject the arguments advanced in the Government's opposition and should grant the motion for leave to file the petition for certiorari and the motion to accelerate consideration of the merits of this case.

ARGUMENT

1. Consistent with its contention that the petition sets forth only two reasons for issuance of an extraordinary writ, the principal thrust of the Government's opposition is an effort to show that neither "the cost of trial" nor "the importance of the legal question" will "*alone* ordinarily justify use of an extraordinary writ" (Opposition, p. 5). (Emphasis supplied.) Even that proposition is surely far more doubtful than the Government's opposition would indicate when asserted in the context of a case involving trial costs that are likely to exceed $1 billion.[2] However, whatever the va-

[2] The Government's prediction (Opposition, p. 5, n. 3) that "the amount and expense of the discovery that ultimately will occur" in this case is substantially less than that set out in an affidavit submitted to the district court (Petition, p. 19, n. 19) is encouraging but wholly unsupported by anything in the record in this case or in recent experience in other Government civil antitrust cases (see Petition, p. 21). Extended controversy as to the future course of this proceeding would be inappropriate at this stage. However, petitioners adhere to the view stated in the Petition (p. 20) that even a cursory review of the Government's Complaint and discovery requests indicates that the discovery and trial of this case would be the most massive undertaking in the history of the American judicial system.

lidity of the Government's contention that neither the cost of trial nor the importance of a question, standing *alone,* would justify an extraordinary writ, that proposition is totally inapposite to a petition for certiorari based upon *all* of the reasons set forth above.

This case involves a fundamental jurisdictional question. Whether or not the district court's orders are characterized as a "usurpation of power" (Opposition, p. 5), the proper resolution of this question could dispose of this entire litigation. This fact clearly distinguishes the proposition relied upon by the Government and virtually every case it cites. Neither ***Roche*** v. ***Evaporated Milk Ass'n,*** 319 U.S. 21 (1943); ***Kerr*** v. ***United States District Court for the Northern District of California,*** 96 S. Ct. 2119 (1976); nor ***Will*** v. ***United States,*** 389 U.S. 90 (1967), involved any question going to the jurisdiction of the district court.[3] Indeed, in denying review under the All Writs Act in those cases, the Court expressly pointed out that the "traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction" (***Roche,*** 319 U.S. at 26). Accord, ***Kerr,*** 96 S. Ct. at 2124; ***Will,*** 389 U.S. at 95.[4]

[3] In ***Bankers Life & Cas. Co.*** v. ***Holland,*** 346 U.S. 379 (1953), also relied upon by the Government (Opposition, p. 6, n. 5), this Court declined to issue a writ of mandamus specifically because "petitioner admits that the court had jurisdiction" (*id.* at 382). The only case cited by the Government in which the jurisdiction of the district court was contested and in which this Court declined to issue a writ is ***Ex parte Fahey,*** 332 U.S. 258 (1947), a case involving the power of the district court to allow counsel fees. As the Government correctly points out, this Court regarded that issue to be too trivial to support issuance of the writ. However, ***Ex parte Fahey*** bears no similarity to the present case.

[4] The Government's reliance upon ***Schlagenhauf*** v. ***Holder,*** 379 U.S. 104 (1964), is even more inappropriate since the Court in ***Schlagenhauf*** held that a writ of mandamus should issue even where no jurisdictional question was involved in order to formulate the necessary guidelines on a question of law then facing several lower courts. As pointed out in the petition (pp. 29-31), this situation also exists in the present case. Hence, ***Schlagenhauf,*** far from supporting the position of the Government, actually illustrates yet another reason why the petition in this case should be granted.

The cases relied upon by the Government are therefore entirely consistent with the decisions of this Court in ***United States Alkali Export Association, Inc.*** v. ***United States,*** 325 U.S. 196 (1945), and ***Far East Conference*** v. ***United States,*** 342 U.S. 570 (1952)—the cases principally relied upon by petitioners. As pointed out in the petition (pp. 25-26), the Court in ***United States Alkali*** expressly considered the question of the availability of review under the All Writs Act in a government civil antitrust case and concluded that such review was available where denial of review would work a hardship on the parties and possibly frustrate the purpose of Congress in subjecting certain activities to regulatory as opposed to antitrust control. The ***Far East*** case is even more closely in point, since that case involved an issue for all intents and purposes identical to that presented here, and the Court granted review under the All Writs Act without even discussing the question of its availability.

The Government's efforts to distinguish ***United States Alkali*** and ***Far East*** are as curious as they are incorrect. On the one hand, the Government asserts that the cases are distinguishable "since both the FCC and the United States agree that the district court has jurisdiction over substantial parts of the complaint . . ." (Opposition, p. 6). On the other hand, the Government asserts that the cases are distinguishable since

petitioners "concede the Commission has jurisdiction over much of the conduct which is the subject of this complaint" (*id.*). The fact that the FCC took the position that the district court has jurisdiction over a part of the Complaint here surely does not confer jurisdiction upon the district court or in any way limit the appropriateness of review of an erroneous decision by that court under the All Writs Act.[5] And surely the fact that petitioners "concede" that the Commission has jurisdiction over the conduct involved here—a "concession" absolutely necessary to their contention that the conduct involved is within the exclusive jurisdiction of regulatory agencies—cannot impair their right to raise that question in this or any other court.

The Government's contention that there is something special about the district court's orders in this case that renders them inviolate from review under the All Writs Act (Opposition, p. 7) is equally unsound. The orders involved here are identical in all pertinent respects to the order involved in the *Far East* case. In that case, the district court had similarly found that a part of the conduct involved may have been subject to the exclusive jurisdiction of the Shipping Board and that only some of the conduct was subject to the antitrust

[5] As pointed out in the petition (p. 28, n. 28), this Court held in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 686 (1975), that the question of antitrust jurisdiction over matters subject to regulation is a matter to be resolved by the court, not the regulatory agency involved; and the Court has regularly disagreed with regulatory agencies with respect to the proper resolution of such questions. Moreover, in *United States Alkali*, the Court pointed out that the appropriateness of an extraordinary writ to resolve such questions was based upon the need to prevent "frustration of the functions which *Congress has directed* the Commission to perform" (325 U.S. at 204) (emphasis supplied), thus making it plain that it is the purpose of Congress, not the views of the agency, that is controlling.

laws (*United States* v. *Far East Conference,* 94 F. Supp. 900, 902 (D.N.J. 1951)):

> "The mere fact that the shipping industry is subject to governmental regulation does not wholly exempt those engaged in it from the provisions of the Sherman Act. . . .
>
> "We concede that the Conference Agreement, having been approved by the Shipping Board, may be within the purview of the statutory exemption, but it does not follow that all conduct of the defendants and the practices in which they may be concertedly engaged are exempt from the provisions of Section 1 of the Sherman Act."

Despite the nature of the district court's order in *Far East,* this Court reviewed the case under the All Writs Act and reversed the district court's order. Plainly, the same justification for exercise of the Court's power under the All Writs Act exists here; for here, as there, the Court is in a position to terminate this litigation if the jurisdictional question presented is resolved as petitioners contend it should be.

The Government's contention that review of this case is inappropriate until it has had an opportunity to "flesh out the exact dimensions of the dispute" (Opposition, p. 7) is simply an effort to relitigate the issue which it litigated and lost in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975). In that case, the Government as *amicus curiae* argued to this Court that on the authority of *Thill Securities Corp.* v. *New York Stock Exchange,* 433 F.2d 264 (7th Cir. 1970), *cert. denied,* 401 U.S. 994 (1971), the decision of the jurisdictional question presented there should be deferred until after the case was tried on the merits (Brief for

United States as *Amicus Curiae*, p. 15). In its opinion, however, this Court flatly rejected this approach and expressly declined to follow *Thill* (422 U.S. at 686-87). The *Gordon* approach is unquestionably the proper one to be followed here. The jurisdictional facts relevant to the question before this Court were fully developed in the presentations to the district court and have been fully presented in the petition here. Indeed, the Government essentially conceded that fact in the district court and does not directly challenge it here.

The Government's effort to relitigate this issue merely dramatizes the extent to which it has elevated tactical litigating advantage above public interest considerations in its opposition to the motions here. The petition before this Court sets out in detail the nature of the Complaint in this case and the categories and charges upon which the Government has indicated an intention to rely in an effort to prove that Complaint (pp. 38-40). The Government has nowhere challenged this description of the nature of the case; hence, its assertion of a need to "flesh out the exact dimensions of the dispute" is a transparent effort to inject some coloration into the case that it thinks might be helpful in arguing the fundamental legal issue presented by this petition. Whatever justification there might be for this kind of legal strategy in the ordinary case, it surely is inappropriate to pursue that strategy here in the face of a discovery and trial process of this magnitude.[6]

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[6] The Government's final argument against the appropriateness of review under the All Writs Act—that such review would be contrary to the congressional policy against piecemeal review embodied in the Expediting Act (Opposition, pp. 7-8)—again reflects the unwillingness of the Government to face up to the question

2. The Government contends that this Court should not itself issue the writ sought here even if it concludes that review under the All Writs Act is appropriate, suggesting instead that the Court should await initial review under that Act by the Court of Appeals. In so contending, however, the Government does not question the power of the Court to issue the writ. Quite the contrary, it expressly concedes the existence of such power and cites *Ex parte United States,* 287 U.S. 241, 249 (1932), as establishing the controlling standard for the exercise of that power to be a showing that the question presented is " 'peculiarly appropriate' for action by this Court" (Opposition, p. 9).[7]

Petitioners are in full agreement with the Government's statement of the controlling standard. However, we strongly disagree with its unsupported assertion

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presented here. Petitioners are not seeking piecemeal review. Quite the contrary, they seek a judgment dismissing the Complaint in this case as beyond the jurisdiction of an antitrust court. There is nothing in the Expediting Act or in the policy underlying that Act that is inconsistent with review of that kind of question. Indeed, as pointed out in the petition (pp. 32-33), such review is consistent with and would further the purposes of the Expediting Act.

[7] The relevant portion of this Court's opinion in *Ex parte United States,* stated the appropr[illegible] standard as follows (287 U.S. at 248-49):

> "The rule deducible from the later decisions, and which we now affirm, is, that this court has full power in its discretion to issue the writ of mandamus to a federal district court, although the case be one in respect of which direct appellate jurisdiction is vested in the circuit court of appeals—this court having ultimate discretionary jurisdiction by certiorari—but that such power will be exercised only where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this court should be taken."

Accord, *Ex parte Peru,* 318 U.S. 578, 584-85 (1943).

that the petition here does not establish that this case is peculiarly appropriate for review by this Court.

The relevant considerations are set out in the petition (pp. 26-33). Petitioners would only add that the Government's description of the delay inherent in intermediate appellate review is probably unrealistically optimistic given the heavy work load of the Court of Appeals for the District of Columbia Circuit. Moreover, whatever delay may be involved—and petitioners fear that it would inevitably be substantial—is in no sense justified if, as petitioners believe, this Court must ultimately resolve the fundamental jurisdictional issue in any event.[8] The Government's suggestion that a delay of a year or more is relatively insignificant reflects an approach that must necessarily result in protracted litigation.

3. The Government's efforts (Opposition, pp. 10-11) to make it appear that this Court will exercise its power to grant certiorari before judgment under 28 U.S.C. § 1254(1) only with respect to "(i) issues similar to those already pending before the Court . . . (ii) relations with foreign powers . . . (iii) extreme national

[8] In this connection, petitioners feel compelled to point out the Government's misreliance here upon *Aaron* v. *Cooper*, 357 U.S. 566, 567 (1958) (Opposition, p. 10)—a case in which it is true that this Court denied immediate review in favor of intermediate appellate review in the Court of Appeals. Within two months after that action, the Court felt compelled itself to hear argument in this case at a Special Term of Court, even though it did so only for the purpose of affirming the Court of Appeals. *Cooper* v. *Aaron*, 358 U.S. 1 (1958). Although petitioners do not mean to suggest by recounting this history that the same kind of need would arise here, it does seem plain that the Government's reliance upon *Aaron* v. *Cooper* is misplaced to the extent that it treats that case as vindicating the ordinary appellate processes.

emergency . . . and (iv) the potential for a constitutional crisis . . ." requires no lengthy reply. The fact is that this simply is not so, as demonstrated by the petition (p. 3). ***Railroad Retirement Board* v. *Alton R. R. Co.*,** 295 U.S. 330 (1935), hardly fits into any of these categories. Yet the Court issued certiorari before judgment in that case, on the ground that (295 U.S. at 344):

> "Before hearing in [the court of appeals] the petitioners applied for a writ of certiorari, representing that no serious or difficult questions of fact were involved, and urging the importance of an early and final decision of the controversy."[9]

This is precisely the situation presented by the petition in this case, since this case also involves a legal issue with no serious questions of fact involved and an early decision of this controversy by this Court is even more important here than in *Alton*. For here such a decision would terminate, or at least clarify, the problems of this case, but also could resolve or clarify the problems of thirty other cases pending in six circuits outside the District of Columbia.

4. The Government's only stated objection to petitioners' motion to accelerate consideration is that it "would, if granted, effectively amount to granting certiorari " (Opposition, p. 11). Thus, the Government

[9] The Government's suggestion (Opposition, pp. 11-12, n. 9) that the petition for certiorari under 28 U.S.C. § 1254(1) can be dismissed on the theory that the case is not "in" the Court of Appeals is unsound and inconsistent with the Government's own previous recognition (Opposition, p. 10) that if the Court of Appeals "summarily denies the petition, petitioners may seek certiorari before this Court without delay." If a summary denial can be reviewed on the theory that the case is in the Court of Appeals, it can only be because the filing of the petition put it there.

makes no objection to the procedures proposed in the event the Court does decide to hear the case. Petitioners submit that the Court should hear the case and that, in light of the Government's acquiescence, it should do so on the schedule and under the procedures suggested in the motion.

CONCLUSION

Petitioners have throughout the proceedings in this case sought to subordinate considerations of temporary partisan advantage to the overriding need to obtain a just resolution of the critical issues involved as soon as possible. When the district court initially raised the threshold jurisdictional issue, petitioners expressed a willingness to brief that issue on any schedule acceptable to the Government. Subsequently, when requested by the district court, petitioners filed four lengthy briefs in periods ranging from ten to thirty days. Later, when the district court indicated on November 16, 1976, that it would lift its stay of discovery upon the resolution of certain discovery disputes at a hearing to be held on January 17, 1977, petitioners promptly negotiated a tentative settlement of these disputes with the Government on December 15, 1976, which provided for immediate resumption of discovery.

Against this background, and in light of the fact that the procedure urged by petitioners here reflects a further effort on their part to resolve the basic question overhanging this litigation as promptly as possible, it is unfortunate and distressing that the Government does not see fit to support this procedure which clearly will enhance the administration of justice and remove unnecessary burdens upon the judicial system.

Petitioners respectfully submit that these much desired goals would be served by the granting of their motions for leave to file the petition for certiorari and for accelerated consideration of this case.

Respectfully submitted,

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